TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1910.

No. 241

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

PIERRE GRIMAUD AND J. P. CARAJOUS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED JUNE 8, 1911.

(21716)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 490.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

PIERRE GRIMAUD AND J. P. CARAJOUS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	a	1
Writ of error	b	1
Citation and service	f	2
Answer to writ of error	i	3
Names and addresses of attorneys	j	3
Caption	1	3
Indictment	2	3
Bench warrant	5	5
Marshal's return	6	6
Demurrer to indictment	7	6
Order submitting demurrer	8	7
Order submitting demurrer, etc	9	7
Order sustaining demurrer, etc	10	8
Clerk's certificate to judgment roll	11	8
Opinion on demurrer	12	9
Petition for writ of error	32	20
Assignment of errors	34	21
Order allowing bill of exceptions, writ of error, etc	40	25
Bill of exceptions	41	25
Demurrer to indictment	42	26
Conclusions of the court on demurrer	44	27
Demurrer sustained and exception	64	38
Judge's certificate to bill of exceptions	64	38
Acceptance of service of bill of exceptions	65	38
Judge's certificate as to questions decided	66	39
Order allowing writ of error	68	39
Order extending time to present bill of exceptions	70	40
Clerk's certificate	71	41

19190—09——1

a Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
J. P. CARAJOUS AND PIERRE GRIMAUD, DEFENDANTS IN ERROR.

Transcript of record.

Upon writ of error to the United States District Court for the Southern District of California, Northern Division.

b *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Olin Wellborn, Judge of the District Court of the United States for the Southern District of California, greeting:

Because in the record and proceedings, as also in the giving, making, rendition, entering, and filing of the decision and judgment sustaining the demurrer of the defendants, Pierre Grimaud and J. P. Carajous, to the indictment and dismissing said indictment in that certain cause in the said District Court of the United States for the Southern District of California, Northern Division, before you, in which the United States of America is plaintiff and the said Pierre Grimaud and J. P. Carajous are defendants, a manifest error hath happened to the great damage of the said plaintiff The United States of America, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the
c record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

DARK PAGE BLEED THRU

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of May, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States, in and for the Southern District of California, Ninth Circuit.

The above writ of error is hereby allowed.

OLIN WELLBORN,
District Judge.

d I hereby certify that a copy of the within writ of error was on the 18th day of May, 1909, lodged in the clerk's office of the said United States District Court for the Southern District of California, for the said defendants in error.

[SEAL.] E. H. OWEN,
Clerk of the United States District Court, Southern District of California.

e (Indorsed:) Original. No. 2 Crim. N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

f *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Pierre Grimaud and J. P. Carajous, defendants in error, and to W. W. Kaye, esquire, their attorney, greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Northern Division, wherein the United States of America is plaintiff and you are defendants in error, to show cause, if any there be, why the decision and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, this 18th day of May, A. D. 1909, and

of the Independence of the United States the one hundred and thirty-third.

[SEAL.] OLIN WELLBORN,
District Judge for the Southern District of California.

Attest: E. H. OWEN,
Clerk, U. S. District Court, Southern District of California.

g Service of the within citation and receipt of a copy thereof is hereby admitted this 19th day of May, A. D. 1909.

W. W. KAYE,
Attorney for Pierre Grimaud and J. P. Carajous, defendants in error.

h (Indorsed:) Original. No. 2 Crim. N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Citation. Filed May 20th, 1909. E. H. Owen, clerk.

i The answer of the judge of the District Court of the United States of America in and for the Southern District of California, Northern Division:

The record of all proceedings of the complaint whereof mention is within made, with all things touching same, we certify under the seal of our said District Court to the Supreme Court of the United States, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] E. H. OWEN, *Clerk.*

j *Names and addresses of attorneys.*

For plaintiff in error: A. I. McCormick, esq., United States attorney, Tajo Building, Los Angeles, California; Frank Stewart, esq., assistant United States attorney, Tajo Building, Los Angeles, California.

For defendants in error: W. W. Kaye, esq., Hopkins Building, Bakersfield, California.

1 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
J. P. CARAJOUS AND PIERRE GRIMAUD, DEFENDANTS. } No. 2, Crim.

Transcript of record.

2 In the District Court of the United States for the Southern District of California, Northern Division.

At a stated term of said court, begun and holden at the city of Fresno, within and for the Northern Division of the Southern Dis-

trict of California, on the second Monday in November, in the year of our Lord one thousand nine hundred and seven, the grand jurors of the United States of America, within and for the division and district aforesaid, on their oaths present:

That, under and pursuant to the authority conferred by the act of Congress approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1897, and for other purposes" (30 Statutes at Large, page 35), and the acts of Congress amendatory thereof and supplemental thereto, the Secretary of Agriculture did, on the 12th day of June, 1906, duly make, promulgate, and establish certain rules and regulations for the purpose of regulating the occupancy and use of the public forest reservations of the United States and preserving the forests thereon from destruction; that among the said rules and regulations so made, promulgated, and established by the said Secretary of Agriculture on the said 12th day of June, 1906, is the following, to wit:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, and milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted and require no permit."

That prior to the 26th day of April, 1907, the President of the
3 United States, under, pursuant to, and by virtue of the Act of Congress of March 3, 1891 (— Statutes at Large, page —) by executive proclamation in that behalf, duly and regularly set apart and reserved certain lands in the State of California, including the lands in the county of Kern hereinafter mentioned, as a public forest reservation, and the said lands so set apart and reserved as aforesaid ever since the date of said proclamation have been, and now are, a public forest reservation, known as and called the Sierra Forest Reserve.

That J. P. Carajous and Pierre Grimaud, whose full and true names are to the grand jurors unknown, each and all late of the Northern Division of the Southern District of California, heretofore, and while the aforesaid regulation was in full force and effect, to wit, on the 26th day of April, in the year one thousand nine hundred seven, at the county of Kern, within said division and district aforesaid, and within the jurisdiction of this honorable court, did knowingly, wilfully, wrongfully, and unlawfully pasture and graze, and cause and procure to be pastured and grazed, certain sheep (the exact number of which sheep is to the said grand jurors unknown) upon certain lands in said county of Kern within the limits of and a part of said Sierra Forest Reserve and the southern division thereof, without having theretofore or at any time secured or obtained a permit or any permission for the said pasturing or grazing of said sheep, or any of them, as required by the said rules and regulations of the Secretary of Agriculture as aforesaid; that said sheep, so by the said

DARK PAGE BL

J. P. Carajous and Pierre Grimaud pastured and grazed, and caused to be pastured and grazed, upon and within the limits of the said southern division of the said Sierra Forest Reserve as aforesaid,
were not then and there, or at all, in actual use by any pros-
4 pector, camper, or traveler, nor were the said sheep, or either or any of them, milch or work animals, owned by any bona fide settler or settlers residing in or near a forest reserve.

Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

OSCAR LAWLER,
United States Attorney.

(Endorsed:) No. 2, Crim. United States District Court. Southern District of California, Northern Division. The United States of America vs. Pierre Grimaud and J. P. Carajous. Indictment for violation of the act of June 4, 1888 (25 Stats. at Large, p. 166), and the act of June 4, 1897 (30 Stats. at Large, p. 11), and regulations of the Secretary of Agriculture.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: W. B. Greeley, John W. Weldon, Sam'l P. Allen. A true bill. Chris. Jorgensen, foreman. Presented and filed in open court this 12th day of November, A. D. 1907. E. H. Owen, clerk. By Wm. M. Van Dyke, deputy clerk. Oscar Lawler, United States attorney.

5 UNITED STATES OF AMERICA,
Southern District of California, ss.

To the marshal of the United States of America for the Southern District of California, and his deputies or any or either of them, greeting:

Whereas, at a District Court of the United States of
[SEAL.] America for the Southern District of California, northern Division, begun and held at the city and county of Fresno, within and for the district aforesaid, on the 12th day of November, in the year of our Lord one thousand nine hundred and seven, the grand jurors in and for the said district and division brought into said court a true bill of indictment against J. P. Cazajous and Pierre Grimaud for knowingly, wilfully, wrongfully, and unlawfully grazing and pasturing sheep on a forest reserve in violation of the act of June 4, 1888, and the act of June 4, 1897, and rules and regulations of the Secretary of Agriculture relative to grazing and pasturing stock on forest reserves, as by the same indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said J. P. Carajous and Pierre Grimaud has not yet appeared or pleaded.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said

LEED THRU

J. P. Carajous and Pierre Grimaud and them bring before the said court, at the United States district court room, in the city and county of Fresno, to answer the indictment aforesaid.

6 Witness the Hon. Olin Wellborn, judge of the said District Court, and the seal thereof, at the city and country of Fresno, the 12th day of November A. D. 1907.

Attest:

E. H. OWEN, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk.

OSCAR LAWLER,
U. S. Attorney.

Marshal's office.

UNITED STATES OF AMERICA,
Southern District of California:

In obedience to the warrant I have the bodies of the said J. P. Cazajous, Pierre Grimaud, before the Honorable H. I. Tuppmann, United States commissioner at Bakersfield in and for the Southern District of California, this 20th day of December A. D. 1907.

County of Kern.

LEO V. YOUNGWORTH,
U. S. Marshal,
By JOS. P. COYLE,
Deputy U. S. Marshal.

(Endorsed:) Marshal's Doc. No. 2794, No. 2 Crim. United States District Court, Southern District of California, Northern Division. The United States of America vs. Pierre Grimaud and J. P. Cazajous. Bench warrant. Bailed fixed at $500.00. Oscar Lawler, U. S. attorney. Filed December 23rd, 1907. E. H. Owen, Clerk.

7 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.

Demurrer to the indictment.

Come now the defendants above named, Pierre Grimaud and J. P. Carrajous, and demur to the indictment returned and filed herein, and as grounds of demurrer allege:

I. That the facts stated in said indictment do not constitute a public offense, or a public offense against the United States.

II. That the acts of Congress referred to in said indictment, making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional in that

they are an attempt by Congress to delegate its legislative power to an administrative officer.

W. W. KAYE,
Attorney for Defendants.

(Endorsed:) No. 2 Crim. U. S. Dist. Court, Southern Dist. of Cal., No. Div. The United States of America *vs.* Pierre Grimaud and J. P. Carajous. Demurrer to the indictment. Filed Nov. 15, 1907. E. H. Owen, clerk, Chas. N. Williams, deputy. W. W. Kaye, attorney for defendants.

8 At a stated term, to wit, the May term, A. D. 1908, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the court room thereof, in the city of Fresno, on Monday, the 4th day of May, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, defendants.
} No. 2, Crim., N. D.

Indictment for violation of act of June 4, 1888, act of June 4, 1897, and rules and regulations of the Secretary of Agriculture relative to grazing and pasturing stock on forest reserves. This cause coming on this day to be heard on defendants' demurrer to the indictment; now, on motion of A. I. McCormick, esq., assistant U. S. attorney, and with the consent of defendants' counsel, it is ordered that said demurrer be, and the same hereby is, submitted to the court for its consideration and decision upon briefs to be served and filed as follows: On behalf of the Government within thirty (30) days, and on behalf of defendants within thirty (30) days thereafter.

9 At a stated term, to wit, the November term, A. D. 1908, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the court room in the city of Fresno, on Monday, the 9th day of November, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.
} No. 2, Crim., N. D.

Indictment for violation of act of June 4, 1888, and act of June 4, 1897, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on the forest reserves. Oscar Lawler, esq., U. S. attorney, and Frank Stewart, esq., assistant U. S.

attorney, present as counsel for the U. S., and W. W. Kaye, esq., appearing as counsel for defendant; this cause coming on this day to be heard on a demurrer to the indictment; now, good cause appearing therefor, it is ordered that the same be, and hereby is, submitted, without oral argument, upon the briefs heretofore filed herein, and upon a reply brief to be filed within sixty (60) days. By stipulation of counsel for the respective parties, it is further ordered that said demurrer may be disposed of, and the necessary orders in reference thereto made by the court sitting at Los Angeles, in the Southern Division of this district, with the same force and effect as if the same had been disposed of and the orders relating thereto made by the court sitting at Fresno, in the Northern Division of said district.

10 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

Indictment for violation of act of June 4, 1888, and act of June 4, 1887, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on forest reserves. This cause having heretofore been submitted to the court for its consideration and decision, on a demurrer to the indictment herein, and the court having duly considered the same, and being fully advised in the premises, now reads and files its conclusions thereon, and it is by the court ordered that said demurrer be, and the same hereby is, sustained, and that said indictment be, and the same hereby is, dismissed; to which rulings of the court, the plaintiffs, by A. I. McCormick, esq., U. S. attorney, ask and are allowed to note exceptions, which are hereby entered herein.

Monday, 3rd of May, 1909.
May term, A. D. 1909.

11 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES
vs.
PIERRE GRIMAUD, ET AL. } No. 2, Crim.

I, E. H. Owen, clerk of the District Court of the United States in and for the Southern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled cause.

Attest, my hand and the seal of said court, this 3rd day of May, A. D. 1909.

[SEAL.]

E. H. OWEN, *Clerk.*
CHAS. N. WILLIAMS,
Deputy Clerk.

DARK PAGE BLEE

(Endorsed:) No. 2, Crim. U. S. District Court, Southern District of California, Northern Division The United States vs. Pierre Grimaud and J. P. Carajous. Judgment roll. Filed May 3rd, 1909. E. H. Owen, clerk; Chas. N. Williams, deputy.

12 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
PIERRE GRIMUND AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

Conclusions of the court on demurrer.

The charge against defendants is that of grazing sheep without permission in the Sierra Forest Reserve.

By act of Congress, approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes" (30 U. S. Stat. L., 35; Compiled Statutes, 1901, page 1540), it is provided, among other things, that:

13 "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."

The jurisdiction of the Secretary of the Interior over forest reserves was subsequently transferred to the Secretary of Agriculture, and thereafter, on June 12th, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travellers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit."

A demurrer to the indictment has been interposed on the grounds that the act of Congress above mentioned, so far as it attaches a penalty to any violations of the rules and regulations thereafter to be made by the Secretary of the Interior, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive officer.

) THRU

14 These two grounds will be considered in the order in which I have stated them.

The Supreme Court of the United States has often declared, in unmistakable terms, that there can be no crime against the authority of the United States except where the forbidden act is defined and penalized by statute. (U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199, 206; U. S. vs. Eaton, 144 U. S., 677.) And the Circuit Court of Appeals for this circuit has spoken in decided terms to the same effect. (Peters vs. United States, 94 Fed., 127, 131.)

In United States vs. Hudson, supra, where it is held that the courts of the United States have no common law jurisdiction in criminal cases, the Supreme Court uses the following language:

"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

In Peters vs. United States, supra, the court says:

"It must be borne in mind, that the national courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial. U. S. vs. Walsh, 5 Dill., 60, Fed. Cas. No. 16636; U. S. vs Martin, 4 Cliff., 156, Fed. Cas. No. 15728; In re Greene, 52 Fed., 104; Swift vs. Railroad Co., 64 Fed., 59; U. S. vs. Hudson, 7 Cranch., 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199."

The same doctrine has been elsewhere declared as follows:

15 "In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses, cognizable under the authority of the United States, are such, and only such, as are expressly designated by law; and that Congress must define these crimes, fix their punishment, and confer jurisdiction to try them." (In re Greene, 52 Fed., 104, 111.)

There can be no pretence that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep without permission in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the Government's own theory, it did not become a crime until nine years after the passage of the statute which the Government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and after much reflection I have now no hesitancy in holding that the statute, in so far as it affixes punishment to infractions of executive rules and regulations

DARK PAGE BLEED

thereafter to be promulgated, is incomplete and wholly inadequate to form the basis of a criminal prosecution.

It must be borne in mind that part of a statute may be unconstitutional and void and the residue constitutional and valid (28 Am. & Eng. Ency. of Law, 2d ed., p. 570), and that there is no controversy here over the validity of any part of the act of Congress in question except the provision specifically indicated.

16 That provision was not before the court in Dastervignes vs. United States, 122 Fed., 30, and although it is mentioned by way of recital in the syllabus, there is not the slightest reference to it in the opinion nor anything whatever to show or suggest its pertinency. Indeed, the question could not have arisen there, because the case was not a criminal prosecution, involving, and which alone could involve, the matter of punishment, but simply a civil suit to enjoin grazing, and to which suit the penalty clause of the statute had no possible relation or pertinency.

The court specifically points out that part of the act which was before it and held to be constitutional, as follows, underscoring mine:[a]

"It must be admitted that the legislative authority of the United States is vested in Congress, and that Congress has no authority to delegate legislative power to the Secretary of the Interior, or to any administrative officer the authority to make laws; and if the act of Congress approved June 4, 1897 (30 Stat. 35, U. S. Comp. St. 1901, p. 1540), is legally susceptible of the construction contended for by appellants, it would clearly be unconstitutional. By that act the Secretary of the Interior was authorized to '*make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.*' Does this language delegate any power to the Secretary of the Interior to make a law, or does it simply confer upon the Secretary an authority to adopt such rules and regulations as to him may seem fit and proper in order to secure the objects for which the reservation was created; and such acts to be exercised under and in pursuance of the law enacted by Congress? Let us see. Congress cannot delegate its power to make a law, but it can make a law to delegate a power

17 to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend."

The court nowhere holds, or intimates, that the statute is complete or valid in so far as it attempts to punish such acts as might thereafter be forbidden by the Secretary of the Interior; but it may be fairly inferred, that the court would have held to the contrary, if the question had been presented, from the following expressions at page 34, underscoring mine:[a]

---

[a] The underscored matter is that printed in italics.

EED THRU

"The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not make *any law*, but he exercised the authority given to him, and made *rules* to preserve the forests on the reservation from destruction. *Such rules*, within constitutional limits, have the *force and effect of* law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress."

This declaration, clear and emphatic, that executive rules are not laws, taken in connection with the elementary principle already adverted to, that nothing but a law can define or create a crime absolutely determines the incompleteness and inadequacy of said act of Congress as a penal statute.

Nor is the case of Union Bridge Co. vs. United States, 204 U. S., 364, applicable here. The statute there involved declares the maintenance, after notice from the Secretary of War, of any bridge which unreasonably obstructs free navigation to be a misdemeanor, punishable by a fine not exceeding five thousand dollars, and, furthermore, in substance and effect, though not in terms, makes the final order of the Secretary, for which it provides, conclusive evidence as to the fact of unreasonableness. (30 U. S. Stat. L., 1121, 1153.)

18 This statute, it will be seen, fully defines the crime, affixes the punishment, and is, therefore complete within itself. Its only peculiarity is, that, as I have already indicated, it impliedly establishes in that class of cases a special rule of evidence. This, however, is clearly within the scope of legislative power, and not unfrequently done, either by implication as above shown, or in express terms as appears from the instance below cited. Thus, section 16 of the act of Congress approved August 6, 1846, entitled "An act to provide for the better organization of the Treasury, etc.," contains a provision, subsequently embodied in section 5494 of the Revised Statutes, which reads as follows:

"Upon the trial of any indictment against any person for embezzling public money under the provisions of the six preceding sections, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money." (Sec. 5494 U. S. Rev. St., 9 U. S. Stat. L., 63.)

Examples to the same effect might be multiplied, but the one just referred to sufficiently illustrates the exercise of legislative power in the matter of special procedure.

While the conclusion which I have above announced as to the incompleteness of the statute here in question disposes of this case favorably to the defendants, yet, inasmuch as the other ground of the demurrer is the one most largely, if not wholly, discussed in the

briefs, and touches closely a principle of high moment, I shall give it hurried consideration.

There is no feature of our Government more distinctive or beneficent than the division of its powers into separate departments, and, therefore, the rule which confines the making of laws to Congress is at once elementary and inflexible.

19 Concerning this rule, the Supreme Court of the United States has made the following declaration:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." (Field vs. Clark, 143 U. S., 650, 692.)

There can be no controversy whatever about the principle itself: the only room for dispute lies in its application. In the case at bar the sta'ute does not declare the grazing of sheep, without permission, to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challeng'able on that ground.

While arguments ab inconvenienti of themselves are rarely conclusive, yet in many cases they are entitled to much weight, and this is one of the cases; for, if the contentions which the Government here urges were to prevail, Congress, so far as any legal difficulties are concerned, could easily abdicate in favor of the executive department practically all its powers.

To illustrate: Among the large number of crimes relating to the postal service is the use of the mails for immoral and fraudulent purposes. Congress could repeal existing lesislation on this subject, and, by a new law, authorize and require the Postmaster-General to protect the mails against immoral and fraudulent uses, by suitable rules and regulations, and further provide, that any violation of

20 such rules and regulations should be punished in a specified manner, and, under this grant of authority, said officer could occupy with regulations, springing from his own discretion and will, but enforc'able through penal sanctions, the large field now covered by the criminal laws on that subject, and in this way it would be possible to confer upon the administrative branches of the Government powers whose full exercise would substitute with penalized rules well nigh the whole volume of federal criminal law. It is needless to add that no reasonable interpretation of the Constitution will admit of such a startling result.

ED THRU

This precise question has been under review and ably discussed in another jurisdiction, as follows:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was expressed by the Supreme Court in re Kollock, 165 U. S., 533, as follows:

"'We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.'

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made any rules and regulations, the violation of which it is expressly declared shall be a criminal offense.

21 "But here we are led back to the delegation of legislative power. The rules prescribed by the heads of departments are not necessarily promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

* * * * * * *

"In discussing the statute the Supreme Court laid down this wholesome doctrine:

"'Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted "in violation of a public law, either forbidding or commanding it." (4 American & English Encyclopedia of Law, 642; 4 Bl. Com., 5.) It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing "required by law" in carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient.'

"To like effect are United States vs. Maid (D. C.), 116 Fed., 650, and United States vs. Blasingame (D. C.), 116 Fed., 654.

DARK PAGE BLE

22 "Have we here a case involving the delegation of legislative power? That Congress intended to punish by penalty made certain the violations of regulations made by the Secretary of Agriculture, and to declare the same a criminal offense, is beyond controversy. But the grazing of stock upon the forest reserves has not been prohibited by any congressional act. The prohibition rests entirely upon regulations made by the Secretary. Regulation No. 9 prescribes, as we have seen, that all persons before grazing sheep in a forest reserve must secure a permit, and any person responsible for grazing the same without a permit becomes a violator of the law; that is, whoever violates a rule promulgated by the Secretary violates a law passed by Congress. The evident embarrassment attending the making of regulation 9, in an attempt to bring it within the act of Congress, is apparent by the language used. Clearly there was a keen appreciation of the necessity of supplying that which Congress had failed to enact, and this was attempted by the use of the words 'is liable to punishment for violation of the law.' At times the line is somewhat indistinct between that which constitutes the delegation of legislative power and the delegation of administrative authority.

"This case does not fall within the rule so well explained and amplified by the authorities, that the executive branch of the Government may make proper rules and regulations for carrying into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulations for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and
23 regulations may only be prescribed for carrying out what Congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the Government to define that which is purely legislative, and that is purely legislative which defines rights, permit things to be done, or prohibits the doing thereof. Certainly here it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this cannot be done.

"The objection to the indictment is the absence of a law defining the act therein charged as a criminal offense. Upon that ground the demurrer must be sustained, and the defendant discharged." (United States vs. Matthews, 146 Fed., 306, 308.)

:ED THRU

See also United States vs. Maid, 116 Fed., 650; and United States vs. Blasingame, 116 Fed., 654.

In the former of said cases, at page 652, it is said:

"There is another aspect of the case, however, which furnishes as strong an argument against plaintiff's contention as the one just considered, and it is this: A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra, and yet be ineffectual as the basis of a criminal prosecution. (U. S. vs. Eaton, supra.) The Supreme Court of the United States, in the case last cited, marks the distinction thus:

24 "'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them; and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.'

"The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which can not be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative but ministerial function."

In the latter of said cases, United States vs. Blasingame, 116 Fed., 654, the opinion is brief and as follows:

"I am of opinion that the act (act June 4, 1897, 30 Stat., 11) entitled 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' in so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the Secretary of the Interior for the protection of forest reservations, is in substance and effect a delegation of legislative power to an administrative officer. While the Supreme Court of the United States, in Field vs. Clark, 143 U. S., 649, and also In re Kollock, 165 U. S., 526, held that there was no unconstitutional delegation of power in either case, yet, applying

25 and observing here the principles and distinctions there enunciated and recognized, it is impossible to escape the conclusion which I have announced. U. S. vs. Eaton, 144 U. S., 677, although not precisely like the case at bar, may also be aptly cited in support of said conclusion. Clear statements and pertinent applications of the doctrine announced by the Supreme Court of the United States in the two cases first above cited that legislative power can be exercised only by that branch of the Government to which the Constitution commits it, will be found in People vs. Parks, 58 Cal., 624; Ex Parte

Cox, 63 Cal., 21; and Board of Harbor Com'rs vs. Excelsior Redwood Co., 88 Cal., 491."

I have given to the extract quoted in plaintiffs' brief from an opinion by former Attorney-General Griggs, that respectful attention, which the high character and distinguished ability of its writer, as well as the great office he then held, demands, and can but think that the quotation rests upon a superficial view of the subject.

It starts out with an assumption, which, to my mind, is manifestly erroneous, namely, that "The statute proclaims the punishment for an offense which in general terms is defined by law, the regulation dealing only with a matter of detail and administration necessary to carry into effect the object of the law." The statute, and I refer, of course, only to that provision now under consideration, so far from proclaiming the punishment for an offense which in general terms is defined by law, does not even purport to punish a transgression of law, but the prescribed penalty is affixed to the violation of such rules as the Secretary in his discretion might subsequently make, and which in fact, as I have already indicated, were not made until nine years after the statute was enacted.

26 Again, the quotation: "Suppose Congress had provided that the occupation or use of a forest reservation by any person, without permission of the Secretary, should be a misdemeanor, would this not be a valid exercise of legislative power?" The answer to this question must be in the affirmative, because, in the case supposed, the statute is complete within itself. The legislative power has been duly exercised in prescribing the act which constitutes the crime; but, when the quotation goes on to add, "The present statute does no more," another erroneous postulate, as it seems to me, is assumed. Congress has nowhere declared that the grazing of sheep in a forest reservation, without permission of the Secretary, is a misdemeanor, but the alleged crime results only from the joint operation of the statute and a rule subsequently made by the Secretary. Without the rule there is nothing to which the penalty can attach, and in order to charge the so-called crime, it is necessary, as has been done here, to allege the promulgation and infraction of the rule, without which the statute is wholly devoid of force or effect.

The cases mainly relied on by the Government are, Dastervignes vs. United States and Union Bridge Company vs. United States, supra. In the former, as I have already shown, the penalty clause of the statute was not before the court, and, besides, there are views expressed in the opinion utterly incompatible with the constitutionality of said clause, and that case, therefore, so far as applicable at all, is against, rather than favorable, to the government's claim.

In the other case, Union Bridge Company vs. The United States, the crime was fully defined, and the punishment fixed by the statute, and the duties devolved upon the Secretary of War were only administrative acts in aid of the execution of the statute.

27 In its opinion, at page 382, the court quotes approvingly from a prior decision, Field vs. Clark, as follows:

"'He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.' Again: 'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.' Cincinnati, Wilmington &c. Railroad vs. Commissioners, 1 Ohio St., 77."

Again, at page 385, the court says:

"As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have

28 required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interest which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

There the crime was created, that is, it was defined and the punishment affixed by the statute itself, and, as above stated, the duties which the statute devolved upon the Secretary of War were only in aid of its enforcement.

If I am correct in the views which I have expressed of the Dastervignes case, then two of the other cases relied on by the Government, United States vs. De Guierre, 152 Fed., 568, and Dent vs. United States, 76 Pac. Rep., 455, are unfavorable to its contention, because in each a contrary decision was overruled, solely on the authority, and under a mistaken apprehension of the Dastergivnes case, indicating that both of said courts, if uncontrolled by the Dastervignes case, would hold the statute void. On the first hearing in the latter case,

Dent vs. United States, 71 Pac., 920, 922, the opinion is elabo-
29 rate, able, and convincing, and, with uncommon force and clearness, compresses into a single paragraph its unanswerable argument, as follows:

"We think the fatal defect of the act, so far as the question in case at bar is concerned, is that unlimited power is given thereby to the Secretary of the Interior to determine what is and what is not a crime under the act. It is left to his discretion to determine the acts or omissions which shall render all persons amenable to the criminal law. The act does not prohibit the grazing of sheep on forest reserves, and there is no statute which prohibits it. Whether or not in all cases the authority of the several heads of the departments of the Federal Government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime, or punishable as such, it is an exercise of law-making power, vested by the Constitution, not in such official, but in Congress alone, and as such is unconstitutional."

In most, if not all, of the cases relied upon by the Government, the authority delegated was limited to the ascertainment of facts in particular cases, and these were held to be administrative acts. In the case at bar, however, there is no pretence that the Secretary of Agriculture has been charged with the duty or has acted in the ascertainment of the facts, of particular cases, but what he has undertaken to do is to determine and define a crime, which, according to all the authorities, is a matter of legislative discretion.

In United States vs. Shannon, 151 Fed., 863, 865, the court says:

30 "Let us remember that we are not now dealing with a question of a regulation by the Secretary of the Interior, which makes a violation thereof a crime. Were such the point of inquiry, principles not necessarily here applicable would have to be discussed. United States vs. Eaton, 144 U. S., 677; United States vs. Mathews (D. C.), 146 Fed., 306. We can therefore eliminate any question of the liberty of the citizen, and proceed to inquire into the matter of the policy of the State concerning cattle growers, to ascertain the force of that policy in the present instance."

From this it appears that the court, in the last case, was careful to avoid any expression which might be applied to the question here under consideration.

Plaintiff, in its brief, advances the proposition that "The Government, in dealing with forest reservations, is acting not only in its sovereign capacity, but as a landed proprietor," and seeks to draw therefrom the inference that trespasses upon such reservations becomes crimes without legislation to that effect. This inference, to my mind, is obviously a nonsequitur. The fact that the Government may be endeavoring to protect its own lands in no way affects the vital principle of our Constitution, as it is distinctively called by the Supreme Court, which forbids the delegation of legislative power.

In the clause quoted in plaintiff's brief with emphasis from Canfield vs. United States, 167 U. S., 518, 525, "If the act be construed as applying only to fences actually erected upon public lands, it is manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass," the words "prosecute for such a trespass," manifestly refer to civil suits, such as the one then before the court.

31 The government's contention on this branch of the case is fully met by the numerous Supreme Court decisions hereinbefore cited, to the effect that, under the federal system, there can be no crimes except such as are created, that is expressly defined and penalized, by an act of Congress.

The demurrer to the indictment will be sustained.

OLIN WELLBORN, *Judge.*

(Endorsed:) No. 2, Crim. U. S. District Court, Southern District of California, Northern Division. The United States vs. Pierre Grimaud et al. Conclusions of the court on demurrer. Filed May 3, 1909. E. H. Owen, clerk. Chas. N. Williams, deputy.

32 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

Petition for writ of error.

The United States of America, plaintiff in the above entitled action, feeling itself aggrieved by the decision and judgment of the above entitled court, rendered, given, made, and entered on the 3d day of May, 1909, sustaining the demurrer of the above named defendants to the indictment in this action and dismissing said indictment, comes now and petitions said court for an order allowing said plaintiff, The United States of America, to prosecute a writ of error to the honorable the Supreme Court of the United States from said decision

and judgment, and the whole thereof, under and according to the laws of the United States and especially under and by virtue of the provisions of the act of Congress of March 2, 1907, ch. 2564, 34 Statutes at Large, 1246, in that behalf made and provided, and said The United States of America prays that said petition for said writ of error may be allowed, and that said writ of error may issue, and that a proper transcript of the record, proceedings, and papers upon which said decision and judgment was given, made, rendered, and entered as aforesaid, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 18th day of May, 1909.

THE UNITED STATES OF AMERICA,
By A. I. MCCORMICK,
United States Attorney for the Southern District of California.

33 (Endorsed:) Original. No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Petition for writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

34 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PIERRE GRIMAUD AND J. P. CARAJOUS, defendants.	No. 2, Crim., N. D.

Assignment of errors.

Now comes the United States of America, plaintiff herein, and says that in the record and proceedings in the above entitled cause there is manifest error, and now makes, presents, and files the following assignment of errors, upon which said the United States of America will rely upon the prosecution of the writ of error in the above entitled cause:

I.

That the District Court of the United States in and for the Southern District of California, Northern Division, erred in sustaining the demurrer interposed by the defendants, Pierre Grimaud and J. P. Carajous, to the indictment in the said cause.

II.

That said District Court erred in ordering said indictment dismissed.

III.

That the said District Court erred in holding, deciding, and adjudging that said indictment did not state a public offense against the laws of the United States.

IV.

That the said District Court erred in holding, deciding, and adjudging that the act of Congress approved June 4, 1897, entitled, "An act making appropriations for sundry civil expenses of the
35 Government for the fiscal year 1897, and for other purposes" (30 Statutes at Large, 35, Comp. Stat., 1901, page 1540), in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, attaches a penalty to any violation of the rules and regulations thereafter made or to be made by the Secretary of the Interior or the Secretary of Agriculture is invalid and void, and is basing its said decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

V.

That the said District Court erred in holding, deciding, and adjudging that said act of Congress of June 4, 1897, in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make rules and regulations to regulate the occupation and use of forest reserves and to preserve the forests thereon from destruction and attaches a penalty to any violation of said rules and regulations, is an unconstitutional delegation or attempt at delegation of legislative powers to an executive officer, and in basing its said decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

VI.

That the said District Court erred in its construction of said act of June 4, 1897, wherein and whereby it held and decided that the said act of June 4, 1897, in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make certain rules and regulations and attaches a penalty to any violation of said rules and regulations, is invalid and void, because said act of Congress does not completely or at all define the acts to be punished, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

36 VII.

That the said District Court erred in its construction of said act of June 4, 1897, wherein and whereby it held and decided that the said

act of Congress did not completely or at all define the acts prohibited and penalized thereby, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that

VIII.

That the said District Court erred in holding, deciding, and adjudging that the said act of June 4, 1897, was invalid in that it did not completely or at all define the acts made criminal and penalized thereby, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

IX.

That the said District Court erred in holding, deciding, and adjudging that the offense set forth and alleged in the indictment in this cause was not defined and penalized in said act of Congress of June 4, 1897, taken in connection with the acts supplemental thereto and amendatory thereof, and in basing its decision and judgment sustaining the said demurrer and dismissing said indictment on that

X.

That the said District Court erred in holding, deciding and adjudging said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for a violation of the rules and regulations of the Secretary of Agriculture relating to the occupancy and use of forest reservations made and promulgated under and in pursuance of the provisions of said act of June 4, 1897.

37 XI.

That the said District Court erred in holding, deciding, and adjud'ing said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for a violation of that certain rule or regulation known as and designated as "Regulation 45," duly made, promulgated, and established by the Secretary of Agriculture under and in pursuance of the provisions of said act of June 4, 1897, and the acts of Congress amendatory thereof and supplemental thereto, which said Regulation 45 is set forth in the indictment in said cause, and in basing its decision and judgment sustaining said demurrer on that ground.

XII.

The said District Court erred in holding, deciding, and adjud'ing that said act of June 4, 1897, when taken in connection with the rules and regulations made, promulgated, and established by the Secretary of Agriculture, under and in pursuance of said act, and the acts supplemental thereto and amendatory thereof, and in particular with Rule 45, set forth in the indictment herein, is invalid and void

as a basis for the offense set forth in the indictment herein, and basing its decision and judgment on that ground.

XIII.

That said District Court erred in holding, deciding, and adjudging said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for violation of the rules and regulations of the Secretary of the Interior or the Secretary of Agriculture, made and established under and in pursuance of the provisions of said act, and the acts supplemental thereto and amendatory thereof, for the alleged reason that said act of June 4, 1897, did not in and by itself and independent of said rules and regulations specifically set forth and define
38 the precise acts prohibited and penalized, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

XIV.

That the said District Court erred in holding said act of Congress of June 4, 1897, invalid in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon from destruction and attaches a penalty to any violation of said rules and regulations, for the alleged reason that it, the said act of Congress, does not completely or at all define the acts to be punished, and in basing its decision and judgment sustaining said demurrer on that ground.

XV.

That said District Court erred in holding that the Congress could not constitutionally delegate to the Secretary of the Interior or the Secretary of Agriculture the right and authority to make rules and regulations to regulate the occupancy and use of forest reserves and to preserve the forests thereon from destruction and provide that any violation of said rules and regulations, thereafter made and established in pursuance of said authority, should constitute a crime and be punishable as such, and in basing its said decision and judgment on that ground.

XVI.

That the said District Court erred in refusing to overrule said demurrer of said defendants and in refusing to compel said defendants and each of them to plead to the said indictment.
39 Wherefore, the said United States of America, plaintiff herein, prays that the said decision and judgment of the said District Court of the United States for the Southern District of California, Northern Division, and the whole thereof be in all things

reversed, and that the said United States District Court be directed to reinstate said indictment and to overrule the demurrer of said defendants and compel said defendants and each of them to plead to the indictment in said cause.

THE UNITED STATES OF AMERICA,
By A. I. McCORMICK,
United States Attorney for the Southern District of California.

(Endorsed:) Original. No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Assignment of errors. Filed May 18th, 1909. E. H. Owen, clerk.

40 At a stated term, to wit, the January term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Tuesday, the 18th day of May, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS, *vs.* PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.	No. 2, Crim., Northern Division.

Indictment for violation of act of June 4, 1888, and act of June 4, 1897, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on forest reserves. Now comes A. I. McCormick, esq., U. S. attorney, and presents herein a petition for writ of error to the Supreme Court of the United States, and an assignment of errors, which said papers are filed in open court; and thereupon, on motion of A. I. McCormick, esq., U. S. attorney, a bill of exceptions is settled, allowed, signed, and filed in open court, a certificate of the judge of the court and an order allowing writ of error to the Supreme Court of the United States are signed and filed in open court, and a citation is signed and issued in said cause.

41 In the District Court of the United States, in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.	No. 2, Crim., N. D.

Bill of exceptions.

Be it remembered that in this cause the indictment was duly returned, presented, and filed in open court on the 12th day of Novem-

ber, 1907, and that all due and regular proceedings being had, the defendants, Pierre Grimaud and J. P. Carajous, by their attorney, W. W. Kaye, esq., filed, on the 15th day of November, 1907, their joint demurrer to the indictment in said cause, which said demurrer was and is in the words and figures following, to wit:

42 In the District Court of the United States for the Southern District of California, Northern Division.

UNITED STATES OF AMERICA
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS.

Demurrer to the indictment.

Come now the defendants above named, Pierre Grimaud and J. P. Carajous, and demur to the indictment returned and filed herein, and as grounds of demurrer allege:

I. That the facts stated in said indictment do not constitute a public offense against the United States.

II. That the acts of Congress referred to in said indictment, making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture, are unconstitutional in that they are an attempt by Congress to delegate its legislative power to an administrative officer.

W. W. KAYE,
Attorney for Defendants.

43 And thereafter the above entitled court, by its order duly given, made and entered in said cause, all of the parties consenting thereto, ordered that the said demurrer be submitted to the court for its consideration and decision without oral argument and upon briefs to be filed by the respective parties; and the defendants, Pierre Grimaud and J. P. Carajous, having thereafter duly and regularly filed and served their opening brief in said cause, and the plaintiff, United States of America, having thereafter duly and regularly served and filed its brief in said cause, and the said defendants having thereafter duly and regularly served and filed their reply brief to the said brief of plaintiff; and the said briefs having been filed with the said court, and the matter having been duly and regularly submitted to the said court for its decision and judgment, the said court did thereafter, to wit, on the 3d day of May, 1909, duly and regularly render, give, make, and enter its final decision and judgment in said cause, in and by which said decision and judgment the said court did sustain said demurrer and dismiss said indictment, all for the reasons and upon the grounds, and those only, which are set forth in a certain written opinion, then filed by the court in this cause, which opinion is in the words and figures as follows:

44 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

Conclusions of the court on demurrer.

The charge against defendants is that of grazing sheep, without permission, in the Sierra Forest Reserve.

By act of Congress, approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes," 30 U. S. Stat. L., 35, Compiled Statutes, 1901, page 1540, it is provided, among other things, that:

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or
45 such rules and regulations shall be punished as provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."

The jurisdiction of the Secretary of the Interior over forest reserves was subsequently transferred to the Secretary of Agriculture, and, thereafter, on June 12th, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted and require no permit."

A demurrer to the indictment has been interposed on the grounds that the act of Congress above mentioned, so far as it attaches a penalty to any violations of the rules and regulations thereafter to be made by the Secretary of the Interior, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive officer.

These two grounds will be considered in the order in which I have stated them.

The Supreme Court of the United States has often declared in unmistakable terms that there can be no crime against the authority

of the United States, except where the forbidden act is defined and penalized by statute. (U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199, 206; U. S. vs. Eaton, 144 U. S., 677.) And the Circuit Court of Appeals
46 for this circuit has spoken in decided terms to the same effect. (Peters vs. United States, 94 Fed., 127, 131.)

In United States vs. Hudson, supra, where it is held that the courts of the United States have no common law jurisdiction in criminal cases, the Supreme Court uses the following language:

"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

In Peters vs. United States, supra, the court says:

"It must be borne in mind that the notional courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial. U. S. vs. Walsh, 5 Dill., 60 Fed. Cas. No. 16,636; U. S. vs. Martin, 4 Cliff., 156, Fed. Cas. No. 15,728; In re Greene, 52 Fed., 104; Swift vs. Railroad Co., 64 Fed., 57; U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199."

The same doctrine has been elsewhere declared as follows:

"In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses cognizable under the authority of the United States are such, and only such, as are expressly designated by law, and that Congress must define these crimes, fix their punishment, and confer jurisdiction to try
47 them." (In re Greene, 52 Fed., 104, 111.)

There can be no pretence that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep without permission in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the Government's own theory, it did not become a crime until nine years after the passage of the statute which the Government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and, after much reflection, I have now no hesitancy in holding that the statute, in so far as it affixed punishment to infractions of executive rules and regulations thereafter to be promulgated, is incomplete and wholly inad'quate to form the basis of a criminal prosecution.

It must be borne in mind that part of a statute may be unconstitutional and void and the residue constitutional and valid (28 Am. &

Eng. Ency. of Law, 2d ed., p. 570), and that there is no controversy here over the validity of any part of the act of Congress in question except the provision specifically indicated.

That provision was not before the court in Dastervignes vs. United States, 122 Fed., 30, and although it is mentioned, by way of recital, in the syllabus, there is not the slightest reference to it in the opinion, nor anything whatever to show or suggest its pertinency. Indeed, the question could not have arisen there, because the case was
48 not a criminal prosecution, involving, and which alone could involve, the matter of punishment, but simply a civil suit to enjoin grazing, and to which suit the penalty clause of the statute had no possible relation or pertinency.

The court specifically points out that part of the act which was before it, and held to be constitutional, as follows, underscoring mine:[a]

"It must be admitted that the legislative authority of the United States is vested in Congress, and that Congress has no authority to delegate legislative power to the Secretary of the Interior, or to any administrative officer the authority to make laws; and if the act of Congress approved June 4, 1897 (30 Stat. 35, U. S. Comp. St. 1901, p. 1540), is legally susceptible of the construction contended for by appellants, it would clearly be unconstitutional. By that act the Secretary of the Interior was authorized to '*make such rules and regulations and establish*lish *such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.*' Does this language delegate any power to the Secretary of the Interior to make a law, or does it simply confer upon the Secretary an authority to adopt such rules and regulations as to him may seem fit and proper in order to secure the objects for which the reservation was created, and such acts to be exercised under and in pursuance of the law enacted by Congress? Let us see. Congress cannot delegate its power to make a law; but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend."

49 The court now here holds, or intimates, that the statute is complete or valid in so far as it attempts to punish such acts as might thereafter be forbidden by the Secretary of the Interior; but it may be fairly inferred that the court would have held to the contrary if the question had been presented, from the following expressions at page 34 (underscoring mine).[a]

"The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not ma*de any law*, but he exercised the authority given to him, and made *rules* to preserve the forests on the reservation from destruction. *Such rules*, within constitutional

[a] The underscored matter is that printed in italics.

limits, have the *force and effect of* law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress."

This declaration, clear and emphatic, that executive rules are not laws, taken in connection with the elementary principle already adverted to, that nothing but a law can define or create a crime, absolutely determines the incompleteness and inadequacy of said act of Congress as a penal statute.

Nor is the case of Union Bridge Co. vs. United States, 204 U. S., 364, applicable here. The statute there involved declares the maintenance, after notice from the Secretary of War, of any bridge which unreasonably obstructs free navigation to be a misdemeanor, punishable by a fine not exceeding five thousand dollars, and, furthermore, in substance and effect, though not in terms, makes the final order of the Secretary, for which it provides, conclusive evidence as to the fact of unreasonableness. (30 U. S. Stat. L., 1121, 1153.)

50 This statute, it will be seen, fully defines the crime and affixes the punishment, and is, therefore, complete within itself. Its only peculiarity is that, as I have already indicated, it impliedly establishes in that class of cases a special rule of evidence. This, however, is clearly within the scope of legislative power, and not unfrequently done, either by implication, as above shown, or in express terms, as appears from the instance below cited. Thus section 16 of the act of Congress approved August 6, 1846, entitled "An act to provide for the better organization of the Treasury, etc.," contains a provision subsequently embodied in section 5494 of the Revised Statutes, which reads as follows:

"Upon the trial of any indictment against any person for embezzling public money under the provisions of the six preceding sections, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money." (Secs. 5494, U. S. Rev. St.; 9 U. S. Stat. L., 63.)

Examples to the same effect might be multiplied, but the one just referred to sufficiently illustrates the exercise of legislative power in the matter of special procedure.

While the conclusion which I have above announced as to the incompleteness of the statute here in question disposes of this case favorably to the defendants, yet, inasmuch as the other ground of the demurrer is the one most largely, if not wholly, discussed in the

51 briefs, and touches closely a principle of high moment, I shall give it hurried consideration.

There is no feature of our Government more distinctive or beneficent than the division of its powers into separate departments, and, therefore, the rule which confined the making of laws to Congress is at once elementary and inflexible.

Concerning this rule the Supreme Court of the United States has made the following declaration:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." (Field vs. Clark, 143 U. S., 650, 692.)

There can be no controversy whatever about the principle itself; the only room for dispute lies in its application. In the case at bar, the statute does not declare the grazing of sheep without permission to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus, it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challeng'able on that ground.

While arguments ab inconvenienti of themselves are rarely
52 conclusive, yet in many cases they are entitled to much weight, and this is one of the cases; for, if the contentions which the Government here urges were to prevail, Congress, so far as any legal difficulties are concerned, could easily abdicate in favor of the executive department practically all its powers.

To illustrate: Among the large number of crimes relating to the postal service is the use of the mails for immoral and fraudulent purposes. Congress could repeal existing legislation on this subject, and, by a new law, authorize and require the Postmaster-General to protect the mails against immoral and fraudulent uses, by suitable rules and regulations, and further provide that any violations of such rules and regulations should be punished in a specified manner, and under this grant of authority said officer could occupy with regulations, spring from his own discretion and will, but enforc'able through penal sanctions, the large field now covered by the criminal laws on that subject, and in this way it would be possible to confer upon the administrative branches of the Government powers whose full exercise would substitute with penalized rules well night the whole volume of federal criminal law. It is needless to add that no reasonable interpretation of the Constitution will admit of such a startling result.

This precise question has been under review and ably discussed in another jurisdiction, as follows:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was expressed by the Supreme Court in Re Kollock, 165 U. S., 533, as follows:

53 "'We agreed that the courts of the United States, in determining what constitutes an offense against the United

States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.'

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made any rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to the delegation of legislative power. The rules prescribed by the heads of departments are not necessarioy promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

* * * * * * *

"In discussing the statute the Supreme Court laid down this wholesome doctrine:

"'Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an
54 act committed or omitted "in violation of a public law, either forbidding or commanding it." (4 American & English Encyclopedia of Law, 642; 4 Bl. Com., 5.) It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the ole'margarine act, for carrying it into effect, could be considered as a thing "required by law" in carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient.'

"To like effect are United States vs. Maid (D. C.), 116 Fed., 650, and United States vs. Blasingame (D. C.), 116 Fed., 654.

"Have we here a case involving the delegation of legislative power? That Congress intended to punish by penalty made certain the violations of regulations made by the Secretary of Agriculture, and to declare the same a criminal offense, is beyond controversy. But the grazing of stock upon the forest reserves has not been prohibited by any congressional act. The prohibition rests entirely upon regulations made by the secretary. Regulation No. 9 prescribes, as we have seen, that all persons before grazing sheep in a forest reserve must secure a permit, and any person responsible for grazing the same without

a permit becomes a violator of the law; that is, whoever violates a rule promulgated by the Secretary violates a law passed by
55 Congress. The evident embarrassment attending the making of regulation 9, in an attempt to bring it within the act of Congress, is apparent by the language used. Clearly there was a keen appreciation of the necessity of supplying that which Congress had failed to enact, and this was attempted by the use of the words 'is liable to punishment for violation of the law.' At times the line is somewhat indistinct between that which constitutes the delegation of legislative power and the delegation of administrative authority.

"This case does not fall within the rule so well explained and amplified by the authorities that the executive branch of the Government may make proper rules and regulations for carrying into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulations for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and regulations may only be prescribed for carrying out what Congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress can not leave a statute to be enlarged upon either by the courts or the executive department. It can not authorize any other branch of the Government to define that which is purely legislative, and that is purely legislative which defines rights, permits things to be done, or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this
56 law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this can not be done.

"The objection to the indictment is the absence of a law defining the act therein charged as a criminal offense. Upon that ground the demurrer must be sustained, and the defendant discharged." (United States vs. Matthews, 146 Fed., 306, 308.)

See also United States vs. Maid, 116 Fed., 650; and United States vs. Blasingame, 116 Fed., 654.

In the former of said cases, at page 652 it is said:

"There is another aspect of the case, however, which furnishes as strong an argument against plaintiff's contention as the one just considered, and it is this: A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra, and yet be ineffectual as the basis of a criminal prosecution. (U. S. vs. Eaton, supra.) The

Supreme Court of the United States, in the case last cited, marks the distinction thus:

"'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them; and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do this thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.'

57 "The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which can not be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but a ministerial function."

In the latter of said cases, United States vs. Blasingame, 116 Fed., 654, the opinion is brief and as follows:

"I am of opinion that the act (act June 4, 1897, 30 Stat., 11), entitled 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' in so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the Secretary of the Interior for the protection of forest reservations, is in substance and effect a delegation of legislative power to an administrative officer. While the Supreme Court of the United States, in Field vs. Clark, 143 U. S., 649, and also In re Kollock, 165 U. S., 526, held that there was no unconstitutional delegation of power in either case, yet, applying and observing here the principles and distinctions there enunciated and recognized, it is impossible to escape the conclusion which I have announced. U. S. vs. Eaton, 144 U. S., 677, although not precisely like the case at bar, may also be aptly cited in support of said conclusion. Clear statements and pertinent applications of the doctrine announced by the Supreme Court of the United States in the two cases first

58 above cited that legislative power can be exercised only by that branch of the Government to which the Constitution commits it, will be found in People vs. Parks, 58 Cal., 624; Ex Parte Cox, 63 Cal., 21; and Board of Harbor Com'rs vs. Excelsior Redwood Co., 88 Cal., 491."

I have given to the extract quoted in plaintiffs' brief from an opinion by former Attorney-General Griggs, that respectful attention which the high character and distinguished ability of its writer, as well as the great office he then held, demands, and can but think that the quotation rests upon a superficial view of the subject.

It starts out with an assumption which, to my mind, is manifestly erroneous, namely, that "The statute proclaims the punishment for

an offense which in general terms is defined by law, the regulation dealing only with a matter of detail and administration, necessary to carry into effect the object of the law." The statute, and I refer, of course, only to that provision now under consideration, so far from proclaiming the punishment for an offense which in general terms is defined by law, does not even purport to punish a transgression of law, but the prescribed penalty is affixed to the violation of such rules as the Secretary in his discretion might subsequently make, and which in fact, as I have already indicated, were not made until nine years after the statute was enacted.

Again the quotation: "Suppose Congress had provided that the occupation or use of a forest reservation by any person without permission of the Secretary should be a misdemeanor, would this not be a valid exercise of legislative power?" The answer to this
59 question must be in the affirmative, because, in the case supposed, the statute is complete within itself. The legislative power has been duly exercised in prescribing the act which constitutes the crime; but, when the quotation goes on to add, "The present statute does no more," another erroneous postulate, as it seems to me, is assumed. Congress has nowhere declared that the grazing of sheep in a forest reservation without permission of the Secretary is a misdemeanor, but the alleged crime results only from the joint operation of the statute and a rule subsequently made by the Secretary. Without the rule there is nothing to which the penalty can attach, and in order to charge the so-called crime, it is necessary, as has been done here, to allege the promulgation and infraction of the rule, without which the statute is wholly devoid of force or effect.

The cases mainly relied on by the Government are Dastervignes vs. United States and Union Bridge Company vs. United States, supra. In the former, as I have already shown, the penalty clause of the statute was not before the court, and, besides, there are views expressed in the opinion utterly incompatible with the constitutionality of said clause, and that case, therefore, so far as applicable at all, is against rather than favorable to the Government's claim.

In the other case, Union Bridge Company vs. The United States, the crime was fully defined, and the punishment fixed by statute, and the duties devolved upon the Secretary of War were only administrative acts in aid of the execution of the statute.

In its opinion, at page 382, the court quotes approvingly from a prior decision, Field vs. Clark, as follows:
60 "'He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended in a given contingency, and that in case of such suspensions certain duties should be imposed.' Again: 'The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between

the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.' Cincinnati, Wilmington, &c., Railroad vs. Commissioners, 1 Ohio St., 77."

Again, at page 385, the court says:

"As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have re-
61 quired the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interest which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

There the crime was created—that is, it was defined and the punishment affixed by the statute itself, and, as above stated, the duties which the statute devolved upon the Secretary of War were only in aid of its enforcement.

If I am correct in the views which I have expressed of the Dastervignes case, then two of the other cases relied on by the Government, United States vs. DeGuierre, 152 Fed., 568, and Dent vs. United States, 76 Pac. Rep., 455, are unfavorable to its contention, because, in each a contrary decision was overruled, solely on the authority and under a mistaken apprehension of the Dastervignes case, indi-
cating that both of said courts, if uncontrolled by the
62 Dastervignes case, would hold the statute void. On the first hearing in the latter case, Dent vs. United States, 71 Pac.,

920, 922, the opinion is elaborate, able, and convincing, and, with uncommon force and clearness, compresses into a single paragraph its unanswerable argument, as follows:

"We think the fatal defect of the act, so far as the question in the case at bar is concerned, is that unlimited power is given thereby to the Secretary of the Interior to determine what is and what is not a crime under the act. It is left to his discretion to determine the acts or omissions which shall render all persons amenable to the criminal law. The act does not prohibit the grazing of sheep on forest reserves, and there is no statute which prohibits it. Whether or not in all cases the authority of the several heads of the departments of the Federal Government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime, or punishable as such, it is an exercise of lawmaking power, vested by the Constitution, not in such official, but in Congress alone, and as such is unconstitutional."

In most, if not all of the cases relied upon by the Government, the authority delegated was limited to the ascertainment of facts in particular cases, and these were held to be administrative acts. In the case at bar, however, there is no pretence, that the Secretary of Agriculture has been charged with the duty, or has acted in the
63 ascertainment of the facts of particular cases, but what he has undertaken to do is to determine and define a crime, which, according to all the authorities, is a matter of legislative discretion.

In United States vs. Shannon, 151 Fed., 863, 865, the court says:

"Let us remember that we are not now dealing with a question of a regulation by the Secretary of the Interior, which makes a violation thereof a crime. Were such the point of inquiry, principles not necessarily here applicable would have to be discussed. United States vs. Eaton, 144 U. S., 677; United States vs. Matthews (D. C.), 146 Fed., 306. We can therefore eliminate any question of the liberty of the citizen, and proceed to inquire into the matter of the policy of the State concerning cattle growers, to ascertain the force of that policy in the present instance."

From this it appears that the court, in the last case, was careful to avoid any expression which might be applied to the question here under consideration.

Plaintiff, in its brief, advances the proposition that "The Government, in dealing with forest reservations, is acting not only in its sovereign capacity, but as a landed proprietor," and seeks to draw therefrom the inference that trespasses upon such reservations become crimes without legislation to that effect. This inference, to my mind, is obviously a non seqitur. The fact that the Government may be endeavoring to protect its own lands in no way affects the vital principle of our Constitution, as it is distinctively called by

the Supreme Court, which forbids the delegation of legislative power.

64 In the clause quoted in plaintiff's brief with emphasis from Canfield vs. United States, 167 U. S., 518, 525, "If the act be construed as applying only to fences actually erected upon public lands, it is manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass," the words "prosecute for such a trespass" manifestly refer to civil suits, such as the one then before the court.

The government's contention on this branch of the case is fully met by the numerous Supreme Court decisions hereinbefore cited, to the effect, that, under the federal system there can be no crimes except such as are created, that is expressly defined and penalized, by an act of Congress.

The demurrer to the indictment will be sustained.

OLIN WELLBORN, *Judge.*

To which decision and judgment of the court, so for the reasons and upon the grounds aforesaid, sustaining the said demurrer to the said indictment and ordering said indictment dismissed, and to the whole of said decision and judgment, the United States of America, by its counsel, then and there duly excepted, which said exception was then and there duly and regularly entered in the minutes of said court.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this, its bill of exceptions, and prays that the same may be signed and allowed and duly authenticated and

65 made a part of the record herein, which is accordingly done this 18th day of May, 1909.

OLIN WELLBORN, *District Judge.*

Service of the foregoing proposed bill of exceptions is hereby admitted this 15th day of May, 1909, and it is hereby stipulated that the same is correct and may be settled, approved, and allowed as the bill of exceptions to be used upon writ of error from the Supreme Court of the United States in the above entitled cause.

W. W. KAYE,
Attorney for Defendants Pierre Grimaud and J. P. Carajous.

(Endorsed:) No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California. The United States of America, plaintiff, vs. Pierre Grimaud and J. P. Carajous, defendants. Bill of exceptions. Filed May 18th, 1909. E. H. Owen, clerk. A. I. McCormick, United States attorney.

66 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2 Crim., N. D.

Certificate of Court.

I, the undersigned, Olin Wellborn, United States district judge for the Southern District of California, do hereby certify that the decision and judgment in the above entitled cause, given, made, rendered, and entered by this court on the 3d day of May, 1909, and which said decision and judgment the plaintiff, The United States of America, is taking to the Supreme Court of the United States by writ of error, and in and by which said decision and judgment the demurrer to the indictment was sustained and the said indictment dismissed, was based solely upon the invalidity and construction of those portions of the act of Congress approved June 4, 1897, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes" (30 Statutes at Large, 35), upon which the indictment was founded.

I further certify that the reasons and grounds for the said decision and judgment are given and set forth in full in the written conclusions of this court filed in this cause on said 3d day of May, 1909, a copy of which said conclusions are incorporated in the bill of exceptions in this cause.

Dated May 18th, 1909.

OLIN WELLBORN, *District Judge.*

67 (Endorsed:) Original No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. United States of America, plaintiff, vs. Pierre Grimaud and J. P. Carajous, defendants. Certificate of Court. Filed May 18th, 1909. E. H. Owen, clerk.

68 In the District Court of the United States in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim., N. D.

Order allowing writ of error.

Honorable Olin Wellborn, judge.

Upon reading and filing the petition of the United States of America, plaintiff in the above entitled cause, praying for the allowance of a writ of error in the above entitled cause returnable before the

Supreme Court of the United States, and upon reading and filing the assignment of errors presented with said petition, and on motion of A. I. McCormick, esq., United States attorney for the Southern District of California,

It is hereby ordered that said petition be and the same hereby is allowed and granted; and

It is further ordered that a writ of error be and the same hereby is allowed to have reviewed in the Supreme Court of the United States the decision and judgment sustaining the demurrer of the defendants to the indictment and dismissing said indictment, heretofore given, made, rendered, and entered in the above entitled cause, and that said writ of error be issued by the clerk of the Circuit Court for this district, under the seal of said Circuit Court, pursuant to section 1004 of the Revised Statutes of the United States; and

It is further ordered that a certified transcript of the record, proceedings, and papers herein be transmitted to the said Supreme Court of the United States; and

69 It is further ordered that pending the prosecution and determination of said writ of error, the defendants, Pierre Grimaud and J. P. Carajous, shall be admitted to bail on their own recognizance.

Dated this 18th day of May, 1909.

OLIN WELLBORN,
Judge of the United States District Court,
Southern District of California.

(Endorsed:) Original. No. 2, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Cazajous, defendants. Order allowing writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

70 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2 Crim., N. D.

Order extending time.

Good cause appearing therefore, it is hereby ordered that the plaintiff, United States of America, may have up to and including the 2d day of June, 1909, in which to prepare, serve, and file its proposed bill of exceptions in the above-entitled cause.

Dated this 13th day of May, 1909.

OLIN WELLBORN, *District Judge.*

(Endorsed:) Original. No. 2 Crim., N. D. In the District Court of the United States for the Southern District of California,

Northen Division. The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Carajous, defendants. Order extending time. Filed May 13, 1909. E. H. Owen, clerk.

71 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PIERRE GRIMAUD AND J. P. CARAJOUS, DEFENDANTS. } No. 2, Crim.

I, E. H. Owen, clerk of the District Court of the United States of America in and for the Southern District of California, do hereby certify the foregoing seventy (70) typewritten pages, numbered from 1 to 70 inclusive, and comprised in one volume, to be a full, true, and correct transcript and copy of the pleadings, and all proceedings, orders, and papers (exclusive of recognizances and briefs) upon which the demurrer was sustained and the indictment dismissed in said cause, and the decision and judgment of the court, and the written opinion or conclusions of the court, and also of the bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, and the certificate of the court, in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court of the United States of America this 26th day of May, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-third.

[SEAL.]

E. H. OWEN,
Clerk of the United States District Court for the Southern District of California.

(Indorsement on cover:) File No. 21,716. S. California D. C. U. S. Term No. 490. The United States, plaintiff in error, vs. Pierre Grimaud and J. P. Carajous. Filed June 8th, 1909. File No. 21,716.

○

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible], 1910.

No. 942

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ANTONIO ZEDA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED JUNE 5, 1911.

(21717.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 491.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ANTONIO INDA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	a	1
Writ of error	b	1
Citation and service	e	2
Answer to writ of error	h	3
Names and addresses of attorneys	i	3
Caption	1	3
Indictment	2	3
Bench warrant	5	5
Marshal's return	6	6
Demurrer to indictment	7	6
Order submitting demurrer	8	6
Order submitting demurrer, etc	9	7
Order sustaining demurrer, etc	10	8
Clerk's certificate to judgment roll	11	8
Opinion on demurrer	12	9
Petition for writ of error	13	9
Assignment of errors	15	10
Order allowing bill of exceptions, writ of error, etc	21	13
Bill of exceptions	22	14
Demurrer to indictment	22	14
Conclusions of the court on demurrer	24	15
Conclusions in U. S. *v.* Grimaud & Carajous	25	16
Judge's certificate to bill of exceptions	43	27
Acceptance of service of bill of exceptions	44	27
Judge's certificate as to questions involved, etc	45	28
Order allowing writ of error, etc	47	28
Order extending time to prepare bill of exceptions	49	29
Clerk's certificate	50	30

a Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
ANTONIO INDA, DEFENDANT IN ERROR.

Transcript of record.

Upon writ of error to the United States District Court for the Southern District of California, Northern Division.

b *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable Olin Wellborn, judge of the District Court of the United States for the Southern District of California, Greeting:

Because in the record and proceedings, as also in the giving, making, rendition, entering and filing of the decision and judgment sustaining the demurrer of the defendant, Antonio Inda, to the indictment and dismissing said indictment in that certain cause in the said District Court of the United States for the Southern District of California, Northern Division, before you, in which the United States of America is plaintiff and the said Antonio Inda is defendant, a manifest error hath happened, to the great damage of the said plaintiff, the United States of America, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme
c Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of May, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States, in and for the Southern District of California, Ninth Circuit.

The above writ of error is hereby allowed.

OLIN WELLBORN,
District Judge.

c½ I hereby certify that a copy of the within writ of error was on the 18th day of May, 1909, lodged in the clerk's office of the said United States District Court for the Southern District of California, for the said defendant in error.

[SEAL.] E. H. OWEN,
Clerk of the United States District Court,
Southern District of California.

d (Indorsed:) Original. No. 3 Crim. N. D. In the District Court of the United States for the Southern District of California, Northern Division. United States of America plaintiffs, vs. Antonio Inda, defendant. Writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

e *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Antonio Inda, defendant in error, and to W. W. Kaye, esquire, his attorney, greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Northern Division, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the decision and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, this 18th day of May, A. D. 1909, and of the independence of the United States the one hundred and thirty-third.

[SEAL.] OLIN WELLBORN,
District Judge for the Southern
District of California.

Attest:

E. H. OWEN,
Clerk U. S. District Court,
Southern District of California.

f Service of the within citation and receipt of a copy thereof is hereby admitted this 19th day of May, A. D. 1909.

W. W. KAYE,
Attorney for Antonio Inda, Defendant in Error.

g (Indorsed:) Original. No. 3 Crim. N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plain-

tiffs, vs. Antonio Inda, defendant. Citation. Filed May 20th, 1909. E. H. Owen, clerk.

h The answer of the judge of the District Court of the United States of America in and for the Southern District of California, Northern Division:

The record of all proceedings of the complaint whereof mention is within made, with all things touching same, we certify, under the seal of our District Court, to the Supreme Court of the United States, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] E. H. OWEN, *Clerk.*

i *Names and addresses of attorneys.*

For plaintiff in error: A. I. McCormick, esq., United States attorney, Tajo Building, Los Angeles, California; Frank Stewart, esq., assistant United States attorney, Tajo Building, Los Angeles, California.

For defendant in error: W. W. Kaye, esq., Hopkins Building, Bakersfield, California.

1 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT. } No. 3 Crim.

Transcript of record.

2 In the District Court of the United States for the Southern District of California, Northern Division.

At a stated term of said court, begun and holden at the city of Fresno, within and for the Northern Division of the Southern District of California, on the second Monday in November, in the year of our Lord one thousand nine hundred and seven, the grand jurors of the United States of America, within and for the division and district aforesaid, on their oaths present:

That under and pursuant to the authority conferred by the act of Congress approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1897, and for other purposes" (30 Statutes at Large, page 35), and the acts of Congress amendatory thereof and supplemental thereto, the Secretary of Agriculture did, on the 12th day of June, 1906, duly make, promulgate, and establish certain rules and regulations for the purpose of regulating the occupancy and use

of the public forest reservations of the United States, and preserving the forests thereon from destruction: that among said rules and regulations so made, promulgated, and established by the said Secretary of Agriculture on the said 12th day of June, 1906, is the following, to wit:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, and milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit."

That prior to the 26th day of April, 1907, the President of the United States, under, pursuant to, and by virtue of the act of Congress of March 3, 1891 (— Statutes at Large, page —), by
3 executive proclamation in that behalf, duly and regularly set apart and reserved certain lands in the State of California, including the lands in the county of Kern hereinafter mentioned, as a public forest reservation, and the said lands so set apart and reserved as aforesaid ever since the date of said proclamation have been, and now are, a public forest reservation, known as and called the Sierra Forest Reserve.

That Antonio Inda, whose full and true name is to the grand jurors unknown, late of the Northern Division of the Southern District of California, heretofore, and while the aforesaid rules and regulations of the said Secretary of Agriculture (and particularly that certain rule and regulation hereinbefore set forth) were in full force and effect, to wit, on the 26th day of April, in the year one thousand nine hundred and seven, at the county of Kern, within said division and district aforesaid, and within the jurisdiction of this honorable court, did knowingly, wilfully, wrongfully, and unlawfully pasture and graze, and cause and procure to be pastured and grazed, certain sheep (the exact number of which sheep is to the grand jurors unknown) upon certain lands in said county of Kern, within the limits of and a part of said Sierra Forest Reserve and the southern division thereof, without having theretofore or at any time secured or obtained a permit or any permission for the said pasturing or grazing of said sheep, or any of them, as required by the said rules and regulations of the Secretary of Agriculture as aforesaid; that said sheep, so by the said Antonio Inda pastured and grazed, and caused and procured to be pastured and grazed upon and within the limits of the said southern division of the said Sierra Forest Reserve as aforesaid, were not then and there, or *at* any time or at all, in actual use by any prospector, camper, or traveler, nor were the said sheep, or either or any of them, milch or work animals, owned by any bona fide settlers residing in or near a forest reserve.

4 Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

OSCAR LAWLER,
United States Attorney.

(Endorsed:) No. 3, Crim. United States District Court, Southern District of California, Northern Division. The United States of America vs. Antonio Inda. Indictment for violation of the act of June 4, 1888 (25 Stats. at Large, p. 166), and the act of June 4, 1897 (30 Stats. at Large, p. 11), and regulations of the Secretary of Agriculture.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: W. B. Greeley, John W. Weldon, Sam'l P. Allen. A true bill. Chris. Jorgensen, foreman.

Presented and filed in open court, this 12th day of November, A. D. 1907. E. H. Owen, clerk. By Wm. H. Van Dyke, deputy clerk. Oscar Lawler, United States attorney.

5 UNITED STATES OF AMERICA,
Southern District of California, ss.

To the marshal of the United States of America for the Southern District of California and his deputies, or any or either of them, greeting:

Whereas, at a District Court of the United States of America for the Southern District of California, Northern Division, [SEAL.] begun and held at the city and county of Fresno, within and for the district aforesaid, on the 12th day of November, in the year of our Lord one thousand nine hundred and seven, the grand jurors in and for the said district and division brought into the said court a true bill of indictment against Antonio Inda for pasturing sheep on a forest reserve, in violation of the act of June 4, 1888, and the act of June 4, 1897, and rule and regulations of the Secretary of Agriculture relative to grazing and pasturing stock on forest reserves, as by the same indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said Antonio Inda has not yet appeared or pleaded.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Antonio Inda and him bring before the said court, at the United States District Court room, in the city and county of Fresno, to answer the indictment aforesaid.

Witness the Hon. Olin Wellborn, judge of the said District Court, and the seal thereof, at the city and county of Fresno, the 12th day of November, A. D. 1907.

Attest:

E. H. OWEN, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk.

OSCAR LAWLER,
U. S. Attorney.

6 *Marshal's office.*

UNITED STATES OF AMERICA,
Southern District of California:

In obedience to the warrant I have the body of the said Antonio Inda before the Honorable H. I. Tuppman, United States commissioner at Bakersfield, in and for the Southern District of California, this 20th day of December, A. D. 1907.

County of Kern.

LEO V. YOUNGWORTH,
U. S. Marshal,
By JOS. P. COYLE,
Deputy U. S. Marshal.

(Endorsed:) Marshal's Doc. No. 2795, No. 3 Crim. United States District Court, Southern District of California. The United States of America vs. Antonio Inda. Bench warrant. Bail fixed at $500.00. Oscar Lawler, U. S. attorney. Filed Dec. 23rd, 1907. E. H. Owen, clerk.

7 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA
vs.
ANTONIO INDA, DEFENDANT.

Demurrer to the indictment.

Comes now the defendant above named, Antonio Inda, and demurs to the indictment returned and filed herein, and as grounds of demurrer alleges:

I. That the facts stated in said indictment do not constitute a public offense, or a public offense against the United States.

II. That the acts of Congress referred to in said indictment, making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional in that they are an attempt by Congress to delegate its legislative power to an administrative officer.

W. W. KAYE,
Attorney for Defendant.

(Endorsed:) No. 3 Crim. U. S. District Court, So. Dist. of Cal., No. Div. The United States of America vs. Antonio Inda. Demurrer to the indictment. Filed Nov. 15, 1907. E. H. Owen, clerk, Chas. N. Williams, deputy. W. W. Kaye, attorney for defendant.

8 At a stated term, to wit, the May term, A. D. 1908, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the

court room thereof, in the city of Fresno, on Monday, the 4th day of May, in the year of our Lord one thousand nine hundred and eight:

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
ANTONIO INDA, DEFENDANT. } No. 3, Crim., N. D.

Indictment for violation of act of June 4, 1888, act of June 4, 1897, and rules and regulations of the Secretary of Agriculture relative to grazing and pasturing stock on forest reserves. This cause coming on this day to be heard on defendant's demurrer to the indictment; now, on motion of A. I. McCormick, esq., assistant U. S. attorney, and with the consent of defendant's counsel, it is ordered that said demurrer be, and the same hereby is submitted to the court for its consideration and decision upon briefs to be served and filed as follows: On behalf of the Government within thirty (30) days, and on behalf of defendant within thirty (30) days thereafter.

9 At a stated term, to wit, the November term, A. D. 1908, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the court room in the city of Fresno, on Monday, the 9th day of November, in the year of our Lord one thousand nine hundred and eight:

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
ANTONIO INDA, DEFENDANT. } No. 3, Crim., N. D.

Indictment for violation of act of June 4, 1888, and act of June 4, 1897, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on the forest reserves. Oscar Lawler, esq., U. S. attorney, and Frank Stewart, esq., assistant U. S. attorney, present as counsel for the U. S., and W. W. Kaye, esq., appearing as counsel for defendant; this cause coming on this day to be heard on a demurrer to the indictment, now, good cause appearing therefor, it is ordered that the same be, and hereby is submitted, without oral argument, upon the briefs heretofore filed herein, and upon a reply brief to be filed within sixty (60) days. By stipulation of counsel for the respective parties, it is further ordered that said demurrer may be disposed of, and the necessary orders in reference thereto made by the court sitting at Los Angeles, in the Southern Division of this district, with the same force and effect as if the same had been disposed of, and the orders relating thereto made by the court sitting at Fresno, in the Northern Division of said district.

10 In the District Court of the United States, for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
ANTONIO INDA, DEFENDANT.
No. 3, Crim., N. D.

Indictment for violation of act of June 4, 1888, and act of June 4, 1897, and rules and regulations of the Secretary of Agriculture, relative to grazing and pasturing stock on forest reserves. This cause having heretofore been submitted to the court for its consideration and decision, on a demurrer to the indictment herein, and the court having duly considered the same, and being fully advised in the premises, now reads and files its conclusions thereon, and it is by the court ordered that said demurrer be, and the same hereby is sustained, and that said indictment be, and the same hereby is dismissed, to which rulings of the court, the plaintiffs, by A. I. McCormick, esq., U. S. attorney, ask and are allowed to note exceptions, which are hereby entered herein.

Monday, 3rd of May, 1909.

May term, A. D. 1909.

11 In the District Court of the United States, in and for the Southern District of California, Northern Division.

THE UNITED STATES
vs.
ANTONIO INDA.
No. 3, Crim.

I, E. H. Owen, clerk of the District Court of the United States, in and for the Southern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled cause.

Attest, my hand and the seal of said court, this 3rd day of May, A. D. 1909.

[SEAL.]

E. H. OWEN, *Clerk*,
CHAS. N. WILLIAMS,
Deputy Clerk.

(Endorsed:) No. 3, Crim. U. S. District Court, Southern District of California, Northern Division. The United States vs. Antonio Inda. Judgment roll. Filed May 3rd, 1909. E. H. Owen, clerk, Chas. N. Williams, deputy.

12 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
ANTONIO INDA, DEFENDANT.
No. 3, Crim.

Conclusions of the court on demurrer to indictment.

The demurrer to the indictment is sustained. For reasons and authorities, see my conclusions this day filed in No. 2, Crim., The United States of America, plaintiffs, vs. Pierre Grimaud and J. P. Carajous.

OLIN WELLBORN, *Judge.*

(Endorsed:) No. 3, Crim. U. S. District Court, Southern District of California, Northern Division. The United States vs. Antonio Inda. Conclusions of the court on demurrer to indictment. Filed May 3, 1909. E. H. Owen, clerk, Chas. N. Williams, deputy.

13 In the District Court of the United States, in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT.
No. 3, Crim., N. D.

Petition for writ of error.

The United States of America, plaintiff in the above-entitled action, feeling itself aggrieved by the decision and judgment of the above-entitled court, rendered, given, made and entered on the 3d day of May, 1909, sustaining the demurrer of the above-named defendant to the indictment in this action, and dismissing said indictment, comes now and petitions said court for an order allowing said plaintiff, The United States of America, to prosecute a writ of error to the honorable the Supreme Court of the United States from said decision and judgment, and the whole thereof, under and according to the laws of the United States, and especially under and by virtue of the provisions of the act of Congress of March 2, 1907, ch. 2564, 34 Statutes at Large, 1246, in that behalf made and provided, and said The United States of America prays that said petition for said writ of error may be allowed, and that said writ of error may issue, and that a proper transcript of the record, proceedings and papers upon which said decision and judgment was given, made and entered as aforesaid, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated this 18th day of May, 1909.

THE UNITED STATES OF AMERICA,
By A. I. MCCORMICK,
United States Attorney for the Southern District of California.

14 (Endorsed:) Original. No. 3, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Ontonio Inda, defendant. Petition for writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

15 In the District Court of the United States, in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT. } No. 3, Crim., N. D.

Assignment of errors.

Now comes the United States of America, plaintiff herein, and says that in the record and proceedings in the above-entitled cause there is manifest error, and now makes, presents and files the following assignment of errors, upon which said the United States of America will rely upon the prosecution of the writ of errors in the above-entitled cause:

I.

That the District Court of the United States, in and for the Southern District of California, Northern Division, erred in sustaining the demurrer interposed by the defendant, Antonio Inda, to the indictment in the said cause.

II.

That said District Court erred in ordering said indictment dismissed.

III.

That the said District Court erred in holding, deciding, and adjudging that said indictment did not state a public offense against the laws of the United States.

IV.

That the said District Court erred in holding, deciding, and adjudging that the act of Congress approved June 4, 1897, entitled,

16 "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes" (30 Statutes at Large, 35, Comp. Stat. 1901, page 1540), in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, attaches a penalty to any violation of the rules and regulations thereafter made or to be made by the Secretary of the Interior or the Secretary of Agriculture is invalid and

void, and in basing its said decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

V.

That the said District Court erred in holding, deciding and adjudging that said act of Congress of June 4, 1897, in so far as it, taken in connection with the Acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make rules and regulations to regulate the occupation and use of forest reserves and to preserve the forests thereon from destruction and attaches a penalty to any violation of said rules and regulations, is an unconstitutional delegation or attempt at delegation of legislative powers to an executive officer, and in basing its said decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

VI.

That the said District Court erred in its construction of said act of June 4, 1897, wherein and whereby it held and decided that the said act of June 4, 1897, in so far as it, taken in connection with the acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make certain rules and regulations and attaches a penalty to any violation of said rules and regulations, is invalid and void, because said act of Congress does
17 not completely or at all define the acts to be punished, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

VII.

That the said District Court erred in its construction of said act of June 4, 1897, wherein and whereby it held and decided that the said act of Congress did not completely or at all define the acts prohibited and penalized thereby, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

VIII.

That the said District Court erred in holding, deciding and adjudging that the said Act of June 4, 1897, was invalid in that it did not completely or at all define the acts made criminal and penalized thereby, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

IX.

That the said District Court erred in holding, deciding and adjudging that the offense set forth and alleged in the indictment in this cause was not defined and penalized in said act of Congress of June

4, 1897, taken in connection with the act supplemental thereto and amendatory thereof, and in basing its decision and judgment sustaining the said demurrer and dismissing said indictment on that ground.

X.

That the said District Court erred in holding, deciding and adjudging said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for a violation of the rules and regulations of the Secretary of Agriculture relating to the occupancy and use of forest reservations made and promulgated under and in pursuance of the provisions of said act of June 4, 1897.

18 XI.

That the said District Court erred in holding, deciding and adjudging said act of June 4, 1897, invalid and void as a basis for a criminal prosecution for a violation of that certain Rule or Regulation known as and designated as "Regulation 45", duly made, promulgated and established by the Secretary of Agriculture under and in pursuance of the provisions of said act of June 4, 1897, and the acts of Congress amendatory thereof and supplemental thereto, which said Regulation 45 is set forth in the indictment in said cause, and in basing its decision and judgment sustaining said demurrer on that ground.

XII.

That said District Court erred in holding, deciding and adjudging that said act of June 4, 1897, when taken in connection with the rules and regulations made, promulgated and estabilshed by the Secretary of Agriculture, under and in pursuance of said act, and the acts supplemental thereto and amendatory thereof, and in particular with Rule 45, set forth in the indictment herein, is invalid and void as a basis for the offense set forth in the indictment herein, and in basing its decision and judgment on that ground.

XIII.

That said District Court erred in holding, deciding and adjudging said Act of June 4, 1897, invalid and void as a basis for a criminal prosecution for violation of the rules and regulations of the Secretary of the Interior or the Secretary of Agriculture, made and established under and in pursuance of the provisions of said act, and the acts supplemental thereto and amendatory thereof, for the alleged reason that said act of June 4, 1897, did not in and by itself and independent of said rules and regulations specifically set forth and define
19 the precise acts prohibited and penalized, and in basing its decision and judgment sustaining said demurrer and dismissing said indictment on that ground.

XIV.

That the said District Court erred in holding said Act of Congress of June 4, 1897, invalid in so far as it, taken in connection with the Acts supplemental thereto and amendatory thereof, authorizes and directs the Secretary of Agriculture to make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon from destruction and attaches a penalty to any violation of said rules and regulations, for the alleged reason that it, the said Act of Congress, does not completely or at all define the acts to be punished, and in basing its decision and judgment sustaining said demurrer on that ground.

XV.

That said District Court erred in holding that the Congress could not constitutionally delegate to the Secretary of the Interior or the Secretary of Agriculture the right and authority to make rules and regulations to regulate the occupancy and use of forest reserves and to preserve the forests thereon from destruction and provide that any violation of said rules and regulations, thereafter made and established in pursuance of said authority should constitute a crime and be punishable as such and in basing its said decision and judgment on that ground.

XVI.

That the said District Court erred in refusing to overrule said demurrer of said defendant and in refusing to compel said defendant to plead to the said indictment.

Wherefore, the said United States of America, plaintiff
20 herein, prays that the said decision and judgment of the said District Court of the United States for the Southern District of California, Northern Division, and the whole thereof be in all things reversed, and that the said United States District Court be directed to reinstate said indictment and to overrule the demurrer of said defendant and compel said defendant to plead to the indictment in said cause.

THE UNITED STATES OF AMERICA,
By A. I. McCORMICK,
United States Attorney for the
Southern District of California.

(Endorsed:) Original. No. 3, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Antonio Inda, defendant. Assignment of errors. Filed May 18th, 1909. E. H. Owen, clerk.

21 At a stated term, to wit, the January term, A. D. 1909, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the

court room thereof, in the city of Los Angeles, on Tuesday, the 18th day of May, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
ANTONIO INDA, DEFENDANT.
} No. 3, Crim., Northern Division.

Indictment for violation of act of June 4, 1888, and act of June 4, 1897, and rules and regulations of the Secretary of Agriculture relative to grazing and pasturing stock on forest reserves. Now comes A. I. McCormick, esq., U. S. attorney, and presents herein a petition for writ of error to the Supreme Court of the United States, and an assignment of errors, which said papers are filed in open court; and thereupon, on motion of A. I. McCormick, esq., U. S. attorney, a bill of exceptions is settled, allowed, signed, and filed in open court, a certificate of the judge of the court and an order allowing writ of error to the Supreme Court of the United States are signed and filed in open court, and a citation is signed and issued in said cause.

22 In the District Court of the United States, in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT.
} No. 3, Crim., N. D.

Bill of exceptions.

Be it remembered that in this cause the indictment was duly returned, presented, and filed in open court on the 12th day of November, 1907, and that all due and regular proceedings being had, the defendant, Antonio Inda, by his attorney, W. W. Kaye, esq., filed on the 15th day of November, 1907, his demurrer to the indictment in said cause, which said demurrer was and is in the words and figures following, to wit:

"In the District Court of the United States for the Southern District of California, Northern Division.

"THE UNITED STATES OF AMERICA
"*vs.*
"ANTONIO INDA, DEFENDANT.

"*Demurrer to the indictment.*

"Comes now the defendant above named, Antonio Inda, and demurs to the indictment returned and filed herein, and as
23 grounds of demurrer alleges:

"I. That the facts stated in said indictment do not constitute a public offense, or a public offense against the United States.

"II. That the acts of Congress referred to in said indictment, making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional in that they are an attempt by Congress to delegate its legislative power to an administrative officer.

"(Signed) W. W. KAYE,
"*Attorney for Defendant.*

and thereafter, the above entitled court, by its order duly given, made and entered in said cause, all of the parties consenting thereto, ordered that the said demurrer be submitted to the court for its consideration and decision without oral argument and upon briefs to be filed by the respective parties; and the defendant, Antonio Inda, having thereafter duly and regularly filed and served his opening brief in said cause, and the plaintiff, United States of America, having thereafter duly and regularly served and filed its brief in said cause, and the said defendant having thereafter duly filed his reply to the said brief of plaintiff; and the said briefs having been filed with the said court, and the matter having been duly and regularly submitted to the said court for its decision and judgment, the said court did, thereafter, to wit, on the 3d day of May, 1909, duly and regularly render, give, make, and enter its final decision and judgment in said cause, in and by which said decision and judgment the said court did sustain said demurrer and dismiss said indictment, all for the reasons and upon the grounds, and those only, which are set forth in a certain written opinion, then filed by the court in this cause, which opinion is in the words and figures as follows:

24 "In the District Court of the United States, for the Southern District of California, Northern Division.

"THE UNITED STATES OF AMERICA, PLAINTIFFS, "*vs.* "ANTONIO INDA, DEFENDANT.	No. 3, Crim., N. D.

"*Conclusions of the court on demurrer to the indictment.*

"The demurrer to the indictment is sustained. For reasons and authorities, see my conclusions this day filed in No. 2, Crim., The United States of America, plaintiffs, v. Pierre Grimaud and J. P. Carajous.

"(Signed) OLIN WELLBORN, *Judge.*"

The conclusions referred to in the above order of the court are and were in the words and figures following, to wit:

25 In the District Court of the United States, for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, plaintiffs, *vs.* PIERRE GRIMAUD AND J. P. CARAJOUS, defendants,	No. 2, Crim., N. D.

Conclusions of the court on demurrer.

The charge against defendants is that of grazing sheep, without permission, in the Sierra Forest Reserve.

By act of Congress, approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes," 30 U. S. Stat. L., 35, Compiled Statutes, 1901, page 1540, it is provided, among other things, that—

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."

26 The jurisdiction of the Secretary of the Interior over forest reserves was subsequently transferred to the Secretary of Agriculture, and, thereafter, on June 12th, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit."

A demurrer to the indictment has been interposed on the grounds that the act of Congress above mentioned, so far as it attaches a penalty to any violations of the rules and regulations thereafter to be made by the Secretary of the Interior, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive officer.

These two grounds will be considered in the order in which I have stated them.

The Supreme Court of the United States has often declared, in unmistakable terms, that there can be no crime against the authority of the United States except where the forbidden act is defined and penalized by statute. (U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199, 206; U. S. vs. Eaton, 144 U. S., 677.) And the Circuit Court of Appeals for this circuit has spoken in decided terms to the same effect. (Peters vs. United States, 94 Fed., 127, 131.)

In United States vs. Hudson, supra, where it is held that the
27 courts of the United States have no common law jurisdiction in criminal cases, the Supreme Court uses the following language:

"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

In Peters vs. United States, supra, the court says:

"It must be borne in mind that the national courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial. (U. S. vs. Walsh, 5 Dill., 60, Fed. Cas. No. 16,636; U. S. vs. Martin, 4 Cliff., 156, Fed. Cas. No. 15,728; in re Greene, 52 Fed., 104; Swift vs. Railroad Co., 64 Fed., 59; U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Britton, 108 U. S., 199.)"

The same doctrine has been elsewhere declared as follows:

"In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts can not resort to the common law as a source of criminal jurisdiction; that crimes and offenses, cognizable under the authority of the United States are such, and only such, as are expressly designated by law; and that Congress must define these crimes, fix their punishment, and confer jurisdiction to try them." (In re Greene, 52 Fed., 104, 11.)

There can be no pretence that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep, without permission, in a forest reserve. The statute itself does not forbid, or make any reference whatever to sheep grazing,
28 nor, in the remotest degree suggest that Congress had it at all in mind, and, according to the Government's own theory, it did not become a crime until nine years after the passage of the statute which the Government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and, after much reflection, I have now no hesitancy in holdig that the statute,

in so far as it affixes punishment to infractions of executive rules and regulations thereafter to be promulgated, is incomplete and wholly inadequate to form the basis of a criminal prosecution.

It must be borne in mind that part of a statute may be unconstitutional and void, and the residue constitutional and valid (28 Am. & Eng. Ency. of Law, 2d ed., p. 570), and that there is no controversy here over the validity of any part of the act of Congress in question except the provision specifically indicated.

That provision was not before the court in Dastervignes vs. United States, 122 Fed., 30, and although it is mentioned by way of recital in the syllabus, there is not the slightest reference to it in the opinion, nor anything whatever to show or suggest its pertinency. Indeed, the question could not have arisen there, because the case was not a criminal prosecution, involving, and which alone could involve, the matter of punishment, but simply a civil suit to enjoin grazing, and to which suit the penalty clause of the statute had no possible relation or pertinency.

The court specifically points out that part of the act which was before it, and held to be constitutional, as follows, underscoring mine: [a]

29 "It must be admitted that the legislative authority of the United States is vested in Congress, and that Congress has no authority to delegate legislative power to the Secretary of the Interior, or to any administrative officer the authority to make laws; and if the act of Congress approved June 4, 1897 (30 Stat., 35, U. S. Comp. St. 1901, p. 1540), is legally susceptible of the construction contended for by appellants, it would clearly be unconstitutional. By that act the Secretary of the Interior was authorized to '*make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.*' Does this language delegate any power to the Secretary of the Interior to make a law, or does it simply confer upon the Secretary an authority to adopt such rules and regulations as to him may seem fit and proper in order to secure the objects for which the reservation was created; and such acts to be exercised under and in pursuance of the law enacted by Congress? Let us see. Congress cannot delegate its power to make a law; but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend."

The court nowhere holds, or intimates, that the statute is complete or valid in so far as it attempts to punish such acts as might thereafter be forbidden by the Secretary of the Interior; but it may be fairly inferred that the court would have held to the contrary if the question had been presented, from the following expressions at page 34, underscoring mine:

"The Secretary, by adopting this rule, acted simply as the are that carries out the legislative will. He did not invade any of the

[a] The underscored matter is that printed in italic.

functions of Congress. He did not make *any law*, but he exer-
30 cised the authority given to him, and made *rules* to preserve the forests on the reservation from destruction. *Such rules*, within constitutional limits, have the *force and effect of* law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress."

This declaration, clear and emphatic, that executive rules are not laws, taken in connection with the elementary principle already adverted to, that nothing but a law can define or create a crime, absolutely determines the incompleteness and inadequacy of said Act of Congress as a penal statute.

Nor is the case of Union Bridge Co. vs. United States, 204, U. S., 364, applicable here. The statute there involved declares the maintenance, after notice from the Secretary of War, of any bridge which unreasonably obstructs free navigation to be a misdemeanor, punishable by a fine not exceeding five thousand dollars, and, furthermore, in substance and effect, though not in terms, makes the final order of the Secretary, for which it provides, conclusive evidence as to the fact of unreasonableness. (30 U. S. Stat. L., 1121, 1153.)

This statute, it will be seen, fully defines the crime and affixes the punishment, and is therefore complete within itself. Its only peculiarity is, that, as I have already indicated, it impliedly establishes in that class of cases a special rule of evidence. This however, is clearly within the scope of legislative power, and not unfrequently done, either by implication as above shown, or in express terms as appears from the instance below cited. Thus section 16 of the act of Congress approved August 6, 1846, entitled "An act to provide for the better organization of the Treasury, etc.," contains a provision, subsequently embodied in section 5494 of the Revised Statutes, which reads as follows:

"Upon the trial of any indictment against any person for embez-
zling public money under the provisions of the six preceding
31 sections, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money." (Sec. 5494, U. S. Rev. St., 9 U. S. Stat. L., 63.)

Examples to the same effect might be multiplied, but the one just referred to sufficiently illustrates the exercise of legislative power in the matter of special procedure.

While the conclusion which I have above announced as to the incompleteness of the statute here in question, disposes of this case favorably to the defendants, yet, inasmuch as the other ground of the demurrer is the one most largely if not wholly discussed in the briefs, and touches closely a principle of high moment, I shall give it hurried consideration.

There is no feature of our Government more distinctive or beneficent than the division of its powers into separate departments, and

therefore the rule which confined the making of laws to Congress is at once elementary and inflexible.

Concerning this rule, the Supreme Court of the United States has made the following declaration:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." (Field vs. Clark, 143 U. S., 650, 692.)

There can be no controversy whatever about the principle itself; the only room for dispute lies in its application. In the case at bar the statute does not declare the grazing of sheep without permission to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may
32 thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confined to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengable on that ground.

While arguments ab inconvenienti of themselves are rarely conclusive, yet in many cases they are entitled to much weight, and this is one of the cases; for, if the contentions which the Government here urges were to prevail, Congress, so far as any legal difficulties are concerned, could easily abdicate in favor of the executive department practically all its powers.

To illustrate: Among the large number of crimes relating to the postal service is the use of the mails for immoral and fraudulent purposes. Congress could repeal existing legislation on this subject and, by a new law, authorize and require the Postmaster-General to protect the mails against immoral and fraudulent uses, by suitable rules and regulations, and further provide, that any violations of such rules and regulations should be punished in a specified manner, and under this grant of authority said officer could occupy with regulations springing from his own discretion and will, but enforcable through penal sanctions, the large field now covered by the criminal laws on that subject, and in this way it would be possible to confer upon the administrative branches of the Government powers whose full exercise would substitute with penalized rules well-nigh the whole volume of federal criminal law. It is needless to add that no reasonable interpretation of the Constitution will admit of such a startling result.

33 This precise question has been under review and ably discussed in another jurisdiction, as follows:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was ex-

pressed by the Supreme Court in *Re* Kollock, 165, U. S. 533, as follows:

"'We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.'

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made any rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to the delegation of legislative power. The rules prescribed by the heads of departments are not necessarily promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system complete an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

* * * * * * *

"In discussing the statute the Supreme Court laid down this wholesome doctrine:

34 "'Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted "in violation of a public law, either forbidding or commanding it." (4 American & English Encyclopedia of Laws, 642; 4 Bl. Com., 5.) It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing "required by law" in carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient.'

"To like effect are United States vs. Maid (D. C.), 116 Fed., 650, and United States vs. Blasingame (D. C.), 116 Fed., 654.

"Have we here a case involving the delegation of legislative power? That Congress intended to punish by penalty made certain the violations of regulations made by the Secretary of Agriculture, and to declare the same a criminal offense is beyond controversy. But the grazing of stock upon the forest reserves has not been prohibited by any congressional act. The prohibition rests entirely upon regula-

tions made by the Secretary. Regulation No. 9 prescribes, as we have seen, that all persons before grazing sheep in a forest reserve must secure a permit, and any person responsible for grazing the same without a permit becomes a violator of the law; that is, whoever violates a rule promulgated by the Secretary violates a law
35 passed by Congress. The evident embarrassment attending the making of regulation 9, in an attempt to bring it within the act of Congress, is apparent by the language used. Clearly there was a keen appreciation of the necessity of supplying that which Congress had failed to enact, and this was attempted by the use of the words 'is liable to punishment for violation of the law.' At times the line is somewhat indistinct between that which constitutes the delegation of legislative power and the delegation of administrative authority.

"This case does not fall within the rule so well explained and amplified by the authorities that the executive branch of the Government may make proper rules and regulations for carrying into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulations for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and regulations may only be prescribed for carrying out what Congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It can not authorize any other branch of the Government to define that which is purely legislative, and that is purely legislative which defines rights, permits things to be done, or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished,
36 the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this cannot be done.

"The objection to the indictment is the absence of a law defining the act therein charged as a criminal offense. Upon that ground the demurrer must be sustained, and the defendant discharged." (United States vs. Matthews, 146 Fed., 306, 308.)

See also United States vs. Maid, 116 Fed., 650; and United States vs. Blasingame, 116 Fed., 654.

In the former of said cases, at page 652, it is said:

"There is another aspect of the case, however, which furnishes as strong an argument against plaintiff's contention as the one just considered, and it is this: A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos

oration Co. vs. Gray Eagle Oil Co., supra, and yet be ineffectual
e basis of a criminal prosecution. U. S. vs. Eaton, supra. The
eme Court of the United States, in the case last cited, marks
istinction thus:

Regulations prescribed by the President and by the heads of
rtments, under authority granted by Congress, may be regula-
prescribed by law, so as lawfully to support acts done under
and in accordance with them; and may thus have, in a proper
, the force of law; but it does not follow a thing required by
is a thing so required by law as to make the neglect to do this
a criminal offense in a citizen, where a statute does not dis-
y make the neglect in question a criminal offense.'

he obvious ground of said distinction is that to make an act a
nal offense is essentially an exercise of legislative power, which
ot be delegated, while the prescribing by the President or head
of a department, thereunto duly authorized, of a rule, without
penal sanctions, to carry into effect what Congress has enacted,
although such rule may be as efficacious and binding as though
re a public law, is not a legislative, but a ministerial, function."

the latter of said cases, United States vs. Blasingame, 116 Fed.,
he opinion is brief and as follows:

am of opinion that the act (act June 4, 1897, 30 Stat., 11)
ed 'An act making appropriations for sundry civil expenses
e Government for the fiscal year ending June thirtieth, eighteen
red and ninety-eight, and for other purposes,' in so far as it
res to be a crime any violation of the rules and regulations there-
to be made by the Secretary of the Interior for the protection
rest reservations, is in substance and effect a delegation of legis-
e power to an administrative officer. While the Supreme Court
e United States, in Filed vs. Clark, 143 U. S., 649, and also In
ollock, 165 U. S., 526, held that there was no unconstitutional
ation of power in either case, yet, applying and observing here
rinciples and distinctions there enunciated and recognized, it is
ssible to escape the conclusions which I have announced. U. S.
aton, 144 U. S., 677, although not precisely like the case at bar,
also be aptly cited in support of said conclusion. Clear state-
s and pertinent applications of the doctrine announced by the
eme Court of the United States in the two cases first above cited
legislative power can be exercised only by that branch of the
rnment to which the Constitution commits it, will be found in
le vs. Parks, 58 Cal., 624; Ex Parte Cox, 63 Cal., 21; and Board
arbor Com'rs vs. Excelsior Redwood Co., 88 Cal., 491."

ave given to the extract quoted in plaintiffs' brief from an
on by former Attorney-General Griggs that respectful atten-
which the high character and distinguished ability of its
r, as well as the great office he then held, demands, and can but
that the quotation rests upon a superficial view of the sub-

38 It starts out with an assumption, which, to my mind, is manifestly erroneous, namely, that "The statute proclaims the punishment for an offense which in general terms is defined by law, the regulation dealing only with a matter of detail and administration necessary to carry into effect the object of the law." The statute, and I refer, of course, only to that provision now under consideration, so far from proclaiming the punishment for an offense which in general terms is defined by law, does not even purport to punish a transgression of law, but the prescribed penalty is affixed to the violation of such rules as the Secretary in his discretion might subsequently make, and which in fact, as I have already indicated, were not made until nine years after the statute was enacted.

Again the quotation: "Suppose Congress had provided that the occupation or use of a forest reservation by any person, without permission of the Secretary, should be a misdemeanor, would this not be a valid exercise of legislative power?" The answer to this question must be in the affirmative because in the case supposed, the statute is complete within itself. The legislative power has been duly exercised in prescribing the act which constitutes the crime; but, when the quotation goes on to add, "The present statue does no more," another erroneous postulate, as it seems to me, is assumed. Congress has nowhere declared that the grazing of sheep in a forest reservation without permission of the Secretary is a misdemeanor, but the alleged crime results only from the joint operation of the statute and a rule subsequently made by the Secretary. Without the rule there is nothing to which the penalty can attach, and in order to charge the so-called crime it is necessary, as has been done here, to allege the promulgation and infraction of the rule, without which the statute is wholly devoid of force or effect.

39 The cases mainly relied on by the Government are Dastervignes vs. United States and Union Bridge Company vs. United States, supra. In the former, as I have already shown, the penalty clause of the statute was not before the court, and, besides, there are view expressed in the opinion utterly incompatible with the constitutionality of said clause, and that case, therefore, so far as applicable at all, is against rather than favorable to the Government's claim.

In the other case, Union Bridge Company vs. The United States, the crime was fully defined and the punishment fixed by statute, and the duties devolved upon the Secretary of War were only administrative acts in aid of the execution of the statute.

In its opinion, at page 382, the court quotes approvingly from a prior decision, Field vs. Clark, as follows:

"'He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides from par-

ticular countries, should be suspended in a given contingency, and that in case of such suspensions certain duties should be imposed.' Again: 'The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' Cincinnati, Wilmington &c. Railroad vs. Commissioners, 1 Ohio St., 77."

40 Again, at page 385, the court says:

"As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interest which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

41 There the crime was created: that is, it was defined and the punishment affixed by the statute itself, and, as above stated, the duties which the statute devolved upon the Secretary of War were only in aid of its enforcement.

If I am correct in the views which I have expressed of the Dastervignes case, then two of the other cases relied on by the Government, United States vs. De Guierre, 152 Fed., 568, and Dent vs. United States, 76 Pac. Rep., 455, are unfavorable to its contention, because, in each a contrary decision was overruled, solely on the authority, and under a mistaken apprehension of the Dastervignes case, indicating that both of said courts, if uncontrolled by the Daster-

vignes case, would hold the statute void. On the first hearing in the latter case, Dent vs. United States, 71 Pac., 920, 922, the opinion is elaborate, able, and convincing, and, with uncommon force and clearness, compresses into a single paragraph its unanswerable argument, as follows:

"We think the fatal defect of the act, so far as the question in the case at bar is concerned, is that unlimited power is given thereby to the Secretary of the Interior to determine what is and what is not a crime under the act. It is left to his discretion to determine the acts or omissions which shall render all persons amenable to the criminal law. The act does not prohibit the grazing of sheep on forest reserves, and there is no statute which prohibits it. Whether or not in all cases the authority of the several heads of the departments of the Federal Government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime, or punishable as such, it is an exercise of
42 lawmaking power, vested by the Constitution, not in such officials, but in Congress alone, and as such is unconstitutional."

In most, if not all of the cases relied upon by the Government, the authority delegated was limited to the ascertainment of facts in particular cases, and these were held to be administrative acts. In the case at bar, however, there is no pretence that the Secretary of Agriculture has been charged with the duty, or has acted in the ascertainment of the facts of particular cases, but what he has undertaken to do is to determine and define a crime which, according to all the authorities, is a matter of legislative discretion.

In United States vs. Shannon, 151 Fed., 863, 865, the court says:

"Let us remember that we are not now dealing with a question of a regulation by the Secretary of the Interior which makes a violation thereof a crime. Were such the point of inquiry, principles not necessarily here applicable would have to be discussed. United States vs. Eaton, 144 U. S., 677; United States vs. Matthews (D. C.), 146 Fed., 306. We can therefore eliminate any question of the liberty of the citizen and proceed to inquire into the matter of the policy of the State concerning cattle growers, to ascertain the force of that policy in the present instance."

From this it appears that the court in the last case was careful to avoid any expression which might be applied to the question here under consideration.

Plaintiff, in its brief, advances the proposition that "The Government, in dealing with forest reservations, is acting not only in its sovereign capacity, but as a landed proprietor," and seeks to draw therefrom the inference that trespasses upon such reservations become crimes without legislation to that effect. This inference,

43 to my mind, is obviously a non sequitur. The fact that the Government may be endeavoring to protect its own lands in no way affects the vital principle of our Constitution, as it is distinctively called by the Supreme Court, which forbids the delegation of legislative power.

In the clause quoted in plaintiff's brief with emphasis from Canfield vs. United States, 167 U. S., 518, 525, "If the act be construed as applying only to fences actually erected upon public lands, it is manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass," the words "prosecute for such a trespass" manifestly refer to civil suits, such as the one then before the court.

The Government's contention on this branch of the case is fully met by the numerous Supreme Court decisions hereinbefore cited, to the effect that under the federal system there can be no crimes except such as are created, that is expressly defined and penalized, by an act of Congress.

The demurrer to the indictment will be sustained.

OLIN WELLBORN, *Judge.*

To which decision and judgment of the court, so for the reasons and upon the grounds aforesaid, sustaining the said demurrer to the said indictment and ordering said indictment dismissed and to the whole of said decision and judgment the United States of America, by its counsel, then and there duly excepted, which said exception was then and there duly and regularly entered in the minutes of said court.

And forasmuch as the foregoing matters do not appear of
44 record the plaintiff tenders this, its bill of exceptions, and prays that the same may be signed and allowed, and duly authenticated and made a part of the record herein, which is accordingly done this 18th day of May, 1909.

OLIN WELLBORN, *District Judge.*

Service of the foregoing proposed bill of exceptions is hereby admitted this 15th day of May, 1909, and it is hereby stipulated that the same is correct and may be settled, approved, and allowed as the bill of exceptions to be used upon writ of error from the Supreme Court of the United States in the above entitled cause.

W. W. KAYE,
Attorney for Defendant, Antonio Inda.

(Endorsed:) No. 3, Crim., N. D. In the District Court of the United States for the Southern District of California. The United States of America, plaintiff, vs. Antonio Inda, defendant. Bill of exceptions. Filed May 18th, 1909. E. H. Owen, clerk. A. I. McCormick, United States attorney.

45 In the District Court of the United States, in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT.
} No. 3, Crim., N. D.

Certificate of court.

I, the undersigned, Olin Wellborn, United States district judge for the Southern District of California, do hereby certify that the decision and judgment in the above entitled cause, given, made, rendered and entered by this court on the 3d day of May, 1909, and which said decision and judgment the plaintiff, The United States of America, is taking to the Supreme Court of the United States by writ of error, and in and by which said decision and judgment the demurrer to the indictment was sustained and the said indictment dismissed, was based solely upon the invalidity and construction of those portions of the act of Congress approved June 4, 1897, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year 1897, and for other purposes" (30 Statutes at Large, 35), upon which the indictment was founded.

I further certify that the reasons and grounds for the said decision and judgment are given and set forth in full in the written conclusions of this court filed in this cause on said 3d day of May, 1909, a copy of which said conclusions are incorporated in the bill of exceptions in this cause.

Dated May 18th, 1909.

OLIN WELLBORN, *District Judge.*

46 (Endorsed:) Original. No. 3, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiff, vs. Antonio Inda, defendant. Certificate of Court. Filed May 18th, 1909. E. H. Owen, clerk.

47 In the District Court of the United States, in and for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT.
} No. 3, Crim., N. D.

Order allowing writ of error.

Honorable OLIN WELLBORN, Judge:

Upon reading and filing the petition of the United States of America, plaintiff in the above entitled cause, praying for the allowance of a writ of error in the above entitled cause returnable before

the Supreme Court of the United States, and upon reading and filing the assignment of errors presented with said petition, and on motion of A. I. McCormick, esq., United States attorney for the Southern District of California;

It is hereby ordered that said petition be and the same hereby is allowed and granted; and

It is further ordered that a writ of error be, and the same hereby is, allowed to have reviewed in the Supreme Court of the United States the decision and judgment sustaining the demurrer of the defendant to the indictment and dismissing said indictment, heretofore given, made, rendered and entered in the above entitled cause, and that said writ of error be issued by the clerk of the Circuit Court for this district, under the seal of said Circuit Court, pursuant to section 1004 of the Revised Statutes of the United States; and

It is further ordered that a certified transcript of the record, proceedings, and papers herein be transmitted to the said Supreme Court of the United States; and

48 It is further ordered that pending the prosecution and determination of said writ of error, the defendant, Antonio Inda, shall be admitted to bail on his own recognizance.

Dated this 18th day of May, 1909.

OLIN WELLBORN,
Judge of the United States Ditstrict Court,
Southern District of California.

(Indorsed:) Original. No. 3, Crim., N. D. In the District Court of the United States for the Southern District of California, Northern Division. The United States of America, plaintiffs, vs. Antonio Inda, defendant. Order allowing writ of error. Filed May 18th, 1909. E. H. Owen, clerk.

49 In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT.
} No. 3, Crim., N. D.

Order extending time.

Good cause appearing therefor, it is hereby ordered that the plaintiff, United States of America, may have up to and including the 2d day of June, 1909, in which to prepare, serve and file its proposed bill of exceptions in the above entitled cause.

Dated this 13th day of May, 1909.

OLIN WELLBORN, *District Judge.*

(Indorsed:) Original. No. 3, Crim., N. D. In the Ditstrict Court of the United States for the Southern District of California, North-

ern Division. The United States of America, plaintiffs, vs. Antonio Inda, defendant, Order extending time. Filed May 13, 1909. E. H. Owen, clerk.

50 In the District Court of the United States, for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ANTONIO INDA, DEFENDANT. } No. 3, Crim.

I, E. H. Owen, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing forty-nine (49) typewritten pages, numbered from 1 to 49, inclusive, and comprised in one volume, to be a full, true, and correct transcript and copy of the pleadings, and all proceedings, orders, and papers (exclusive of recognizances and briefs) upon which the demurrer was sustained and the indictment dismissed in said cause, and the decision and judgment of the court, and the written opinion or conclusions of the court, and also of the bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, and the certificate of the court, in the above and therein entitled cause, and, that the same together constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, this 26th day of May, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.] E. H. OWEN,
Clerk of the United States District Court
of the Southern District of California.

(Indorsement on cover:) File No. 21717. S. California D. C. U. S. Term No. 491. The United States, plaintiff in error, *vs.* Antonio Inda. Filed June 8th, 1909. File No. 21717.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PIERRE GRIMAUD AND J. P. CARAJOUS, defendants in error. } No. 490.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ANTONIO INDA, DEFENDANT IN ERROR. } No. 491.

MOTION TO ADVANCE.

The defendants in error were indicted in the District Court of the United States for the Southern District of California for grazing sheep, without permission, in the Sierra Forest Reserve.

By the act of Congress approved June 4, 1897 (30 Stat., 11, 35), it is provided that—

> The Secretary of the Interior [later changed to Secretary of Agriculture] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set

DARK PAGE BLEED THRU

> aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

On June 12, 1906, the Secretary of Agriculture promulgated the following regulation (No. 45):

> All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit.

Demurrers to the indictments were interposed by defendants on the ground that the statute is void, because it does not completely or at all define the acts to be punished and because it attempts a delegation of legislative power to an executive officer. The district court sustained the demurrers, and the Government has sued out these writs of error under the provisions of the act of March 2, 1907 (34 Stat., 1246), known as the "Criminal Appeals" act.

In accordance with the provision of that act that writs of error thereunder "shall be diligently prosecuted and shall have precedence over all other cases," the Solicitor-General moves the court to advance the cases on the docket and set them down for hearing on a day during the present term.

Notice of this motion has been served upon counsel for defendants in error in the court below.

LLOYD W. BOWERS,
Solicitor-General.

DECEMBER, 1909.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN error, *v.* PIERRE GRIMAUD AND J. P. CARAJOUS.	Nos. 490, 491.
THE UNITED STATES, PLAINTIFF IN error, *v.* ANTONIO INDA.	

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

PETITION FOR REHEARING.

The Solicitor-General, in behalf of the United States, respectfully prays the court to grant a rehearing in the above-entitled cases.

It will be recalled that the cases involve two questions. First, whether or not a criminal indictment lies for transgression of the regulations of the Department of Agriculture concerning stock grazing upon forest reservations; and, second, whether or not the act of June 6, 1900, repealed all laws relating to forest reservations in California.

36305—10

Upon the first question there is already a conflict of opinion in the lower courts, with the result that what is punished as a criminal offense in one jurisdiction goes unpunished in another jurisdiction. Upon the decision of the second question depends not only the validity of the administration of forest reserves in California during the past ten years, but the validity of numerous titles to private property which are dependent on the application of the laws for the administration of forest reservations to forest reservations in California. So long, therefore, as such question remains unsettled, it is apt to be a fruitful source of litigation and a hindrance not only to the administration of forest reservations in California, but to the conveyance and use of private property the title to which is now doubtful. It is hoped that these considerations will be deemed sufficient to bring this case within the class in which rehearings have been granted in order to settle important questions about which the court was originally divided in opinion; as illustrated by the recent cases of *B. & O. S. W. Ry. Co.* v. *United States*, Nos. 124–5, in which the judgments were affirmed by a divided court on the same day that the present judgments were so affirmed.

LLOYD W. BOWERS,
Solicitor-General.

I certify that the foregoing petition for rehearing is in my opinion well founded and is presented in good faith.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PIERRE GRIMAUD AND J. P. CARAJOUS. } No. 490.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ANTONIO INDA. } No. 491.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These two cases are alike in all respects. Defendants were indicted for grazing sheep upon the Sierra Forest Reserve without a permit, in violation of Regulation 45 established by the Secretary of Agriculture concerning stock grazing upon forest reserves, and reading as follows:

> Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, and milch or

work animals, not exceeding a total of six head, owned by bona fide settlers residing in or near a forest reserve, which are excepted and require no permit. (Rec., 4.)

This regulation was made by the Secretary of Agriculture in the exercise of authority over forest reserves given him by the terms of the act of Congress approved June 4, 1897 (30 Stat., 11, 35), which reads as follows:

> No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.
>
> The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act

> or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

The following portions of the same act, which immediately succeed the paragraphs just quoted, ought also to be before the court:

> For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the

receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads

and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two

acres for each schoolhouse and one acre for a church.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands

in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The President is hereby authorized at any time to modify any executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve. (30 Stat., 35, 36.)

The act of Congress approved June 4, 1888, which amended Revised Statutes, section 5388, and which defines the nature and extent of the punishment adopted by the above-quoted act of June 4, 1897, for violation of that act or of a rule or regulation made by the proper executive department under that act, prescribes a punishment of not more than $500 fine or not more than twelve months' imprisonment, or both, for unlawfully cutting or wantonly destroying any timber upon lands of the United States reserved for military or other purposes or upon Indian lands. (25 Stat., 166.) The powers conferred upon the Secretary of the Interior by the act of June 4, 1897, in respect to making rules and regulations for the government of forest reservations were transferred to the Secretary of Agriculture by the act of February 1, 1905. (33 Stat., 628.)

The District Court sustained demurrers to the indictments. (Rec., 6 and 9, in case No. 490; Rec., 6 and 16, in case No. 491.)

The positions taken by the District Court were that the act of June 4, 1897, in authorizing the Secretary of Agriculture to make rules and regulations for the administration of forest reserves delegated legislative authority to an executive officer, and that such act of Congress is also unconstitutional because it empowers an executive officer to create a criminal offense. The opinion of the court is the same in both cases and is found on the pages of the two records just indicated.

The cases come to this court by direct writ of error to the District Court under the Criminal Appeals Act of March 2, 1907. (34 Stat., 1246.)

Beyond the questions raised and decided below, another arises concerning the applicability of the act of June 4, 1897, to forest reserves in California since June 6, 1900, in view of the last proviso of the following act of that date, amending the act of June 4, 1897:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter two of the laws of the first session of the Fifty-fifth Congress, being an act entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June fourth, eighteen hundred and ninety-seven, be,

and the same is hereby, amended by striking out the following words where the same appear in said Act, commencing with the word "Before," in line thirty-six on page thirty-five of volume thirty of the United States Statutes at Large, and ending with the word "exists," in the forty-third line of said volume and page, as follows: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists," and insert in lieu thereof the following: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: *Provided, however,* That in cases of unusual emergency the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cordwood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale: *Provided further,* That he may, in his discretion, sell without advertisement, in quan-

28133—10——2

tities to suit applicants, at a fair appraisement, timber and cordwood not exceeding in value one hundred dollars stumpage: *And provided further*, That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers: *And provided further*, That the provisions of this Act shall not apply to existing forest reservations in the State of California, or to reservations that may be hereafter created within said State." (31 Stat., 661.)

ASSIGNMENT OF ERRORS.

The District Court erred in each case in sustaining the demurrer to the indictment.

ARGUMENT.

The following propositions will be advanced:

I. The act of June 6, 1900, amending the act of June 4, 1897, merely excepted forest reservations in California from the general statutory provisions concerning sale of "the dead, matured, or large growth of trees" upon forest reservations. It left all other provisions of the general plan embraced in the act of June 4, 1897, for the administration of forest reservations, still applicable to forest reservations in California as well as elsewhere.

II. The departmental regulation, forbidding stock grazing on a forest reservation without a permit from

the department, is a valid exercise of administrative power, because Congress itself has fixed the general rule to which the department regulations must conform—or, in other words, Congress itself has defined the fundamental ends, viz, protection and improvement of the forests on the reservation, to which the regulations must be subordinate means—and the particular regulation as to stock grazing, which is here involved, conforms to the congressional rule and fairly promotes the designated congressional ends.

III. In refusing permits to use a forest reservation for stock grazing except upon stated terms or in stated ways, the Secretary of Agriculture merely asserts and enforces the proprietary right of the United States over land which it owns. The regulation of the Secretary, therefore, is not an exercise of legislative, or even of administrative, power; but is an ordinary and legitimate refusal of the landowner's authorized agent to allow persons having no right in the land to use it as they will. The right of proprietary control is altogether different from governmental authority.

IV. The regulation of the Secretary of Agriculture being a valid restriction upon use of the forest reservation, which all persons may lawfully be required by Congress to obey, it was permissible for Congress to sanction its requirement of general obedience to that regulation by expressly making disobedience punishable criminally. The crime of violating the regulation is not created by the Secretary of Agriculture, but by Congress itself.

Of these, *seriatim*—

I.

The act of June 6, 1900, amending the act of June 4, 1897, merely excepted forest reservations in California from the general statutory provisions concerning sale of "the dead, matured, or large growth of trees" upon forest reservations. It left all other provisions of the general plan embraced in the act of June 4, 1897, for the administration of forest reservations, still applicable to forest reservations in California as well as elsewhere.

The specific inquiry arises under the last proviso of the act of 1900, which reads:

> *And provided further*, That the provisions of this Act shall not apply to existing forest reservations in the State of California, or to reservations that may be hereafter created within said State.

Does this proviso repeal the entire act of 1897 as to forest reservations in California, or does it merely except the California reservations from the operation of the general statutory rules concerning the sale of dead or matured timber? In the way of verbal form this inquiry may have three branches:

1. Do the words "*this* act" in the proviso of 1900 refer to the act of 1900 itself or to the act of 1897?

2. Do the words "*the provisions* of this act" relate—even if "this act" means the act of 1897—to more than the sale clauses which are the subject both of the act of 1900 and of the paragraph of the act of 1897 which the act of 1900 amends? May not "the

provisions" which the act of 1900 makes inapplicable to California reservations be interpreted to be merely such provisions as relate to the sale of dead or matured timber?

3. Do not the words "*And provided further,*" which mark as a proviso the sentence against application to California reservations, indicate that the proviso is an incident to, and restricted in its scope by, the regulations concerning sale of dead and matured timber, which alone were the subject of the enactment of 1900 and of the paragraph of the act of 1897 which the act of 1900 amended?

Undoubtedly the verbal possibilities of the proviso which it is necessary to interpret admit contradictory answers; but that means only that there is an ambiguity to be resolved. Its resolution must obey the spirit of the legislation; and an answer in accordance with such spirit is proper and indeed imperative, though it narrows the generality of the statutory language.

> *Holy Trinity Church* v. *United States* (143 U. S., 457).

In that case a general prohibition against the incoming of foreigners under contract for "labor of any kind" was restricted to immigration for manual labor.

On all three of the particular questions above indicated several general and deeply practical considerations should be decisive; and they will be presented at the outset because they are more important than any mere verbal detail.

(*a*) If the act of 1897 should be held altogether inapplicable to California forest reservations, by reason of the proviso of 1900, the result would be to create a legislative void concerning the control, preservation, and utilization of forest reservations in that State. The act of 1897 contains a general scheme for control and administration of the forest reservations, and that scheme was applied to such reservations everywhere. Nothing was put in its place by the act of 1900, or ever since has been put in its place. It is not to be supposed, if any other view is possible, that Congress intended in 1900 to leave the California reservations uncovered by a regulative and protective system.

Concretely, the act of 1897 requires survey of forest reservations; allows the President to revoke, modify, or suspend any former proclamation establishing a forest reservation; authorizes executive promulgation of rules for protection of the forests (which is the central element of the present case); gives to the public certain qualified rights of taking timber or stone from the reservation for domestic or business purposes; authorizes roads for ingress and egress of settlers; permits relinquishment of the tracts already settled within the forest reservation, and entry of lieu lands elsewhere; and allows entry of mineral lands within the forest reservation. Are all these salutary and important provisions to be considered obliterated in California forest reservations by the act of 1900 without anything having been put in their place?

Statutes must be so construed as to avoid absurd or unreasonable results if in any way it be possible.

United States v. *Kirby* (7 Wall., 482).

(*b*) Indubitably the general plan of forest administration embraced in the act of 1897 has been continuously in force since that date, and still is in force, everywhere but in California. What good or even specious reason can be advanced for any intention on the part of Congress to except California reservations alone from that general system?

(*c*) Such an act as that of 1900, dealing otherwise with the single and unimportant subject of the manner of selling dead and matured timber upon forest reservations, is a most unnatural vehicle for a repeal of the preceding statute of 1897, in all its many parts and ramifications, so far as it bore upon that part of the United States, California, which perhaps contains the most important forest tracts of the country. Beyond that, the middle of a section of the act of 1897, dealing merely with the sale of dead and matured timber and itself located in the middle of the entire act of 1897, is a most unnatural and unworthy place for a clause extinguishing the entire act as to a large part of the forest-bearing domain of the country. As was said by this court, in another connection:

> We should hardly look for such legislation in an act having the declared purpose and scope of the one now under consideration. (*White* v. *United States*, 191 U. S., 545, 552.)

Indeed, such an obscure and almost insidious undoing of the general legislation concerning forest reservations can not at all be ascribed to Congress.

The history of the amendment of 1900 is in full as follows:

On January 12, 1900, Mr. Gamble, of South Dakota, introduced the following bill:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That chapter two of the laws of the first session of the Fifty-fifth Congress, being an Act entitled: "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June fourth, eighteen hundred and ninety-seven, be, and the same is hereby, amended by striking out the following words where the same appear in said Act, commencing with the word "Before" in line thirty-six, on page thirty-five of volume thirty of the United States Statutes-at-Large, and ending with the word "exists" in the forty-third line of said volume and page, as follows: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a news-

> paper of general circulation published at the capital of the State or Territory where such reservation exists," and inserting in lieu thereof the following: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: *Provided*, That the Commissioner of the General Land Office shall have authority to sell, in case of emergency, such timber from the forest reserve as shall have been designated to any individual or corporation upon giving notice and under such rules and regulations as the Secretary of the Interior shall prescribe." (H. R. 6063, 56th Cong., 1st sess.)

It appears, therefore, that the bill at the outset had no other purpose than to alter the rules concerning manner of sale of dead and matured timber. The House Committee, to which the bill was referred, recommended its passage, with the following amendment:

> Strike out all after the word "exists" in the seventeenth line on page two, and insert in lieu thereof the following: *Provided, however*, That in cases of unusual emergency the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale, at rates of value approved by him and subject to payment of the full amount of the

28133—10——3

highest bid resulting from the usual advertisement of sale: *Provided further,* That he may, in his discretion, sell without advertisement, in quantities to suit applicants, at a fair appraisement, timber and cord wood not exceeding in value one hundred dollars stumpage: *And provided further,* That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers. (House Report 178, vol. 1; 56th Cong., 1st sess.)

The amendment, like the original bill, dealt only with the manner of selling dead and matured timber. There was nothing in the bill or the amendment for exclusion of California from the general forest-reserve law. On February 2, 1900, Mr. Gamble asked for a consideration of the bill. (33 Cong. Rec., 1445.) In a short debate that followed, Mr. Loud, of California, asked Mr. Gamble if the bill did not propose to remove the restriction of advertising as provided under existing law, to which Mr. Gamble replied that it merely reduced the time of advertising to thirty days and permitted the Secretary of the Interior, in cases of urgency, to sell without advertisement timber of value not exceeding $100 for cord wood and for use of miners. Mr. Loud objected to the further consideration of the bill. (33 Cong. Rec., 1445–1446.)

On March 5, 1900, Mr. Lacey called up the bill. (33 Cong. Rec., 2558.) The bill was read again with the amendment recommended by the committee, and a little further debate followed, in which Mr. Loud renewed his objection to the bill, but without assigning any reason therefor. (Ib., 2558.)

On May 14, 1900, Mr. Gamble asked unanimous consent for the consideration of the bill and its amendment. Mr. Loud asked Mr. Gamble if he intended to offer the amendment which had been suggested. (It appears only by inference that the amendment referred to by Mr. Loud was one excluding California from the bill.) Mr. Gamble replied:

> Yes, undoubtedly. I will state to the Speaker that the gentleman from California, who has heretofore objected, waives that objection, if an amendment which I will submit is considered, and which is satisfactory to the California delegation. (33 Cong. Rec., 5522.)

Mr. Lacey then asked if the amendment was a general one applying to all public lands, and Mr. Gamble replied:

> It excepts California from the operation of *this* provision of law.

Mr. Payne then said:

> I would like to know why, if this amendment to this bill as a whole is good for California, it is not good for the whole United States.

To this Mr. Loud replied:

> I will state, in response to the gentleman from New York, that the harm was done originally in the sundry civil bill, which was passed more than a year ago, and to which the pending bill refers. Conditions in the State of California are entirely different, as far as the forest reserves are concerned, from those of Washington, Oregon, and South Dakota. There is and has been a mistake, I think, in the legislation of Congress in this regard. It is impossible to adopt general legislation that will cover a territory so widely different in its interests as our western territory. *As a matter of fact, we have but little timber in California. We want legislation to protect what is remaining. This is essential for the purpose of retaining water derived from the rainy season for the purpose of fertilizing our lands.*
>
> *In Oregon and Washington and that region generally they have more timber than they know what to do with. I do not think that the people of Washington and Oregon, therefore, are able to understand exactly the necessity and the conditions which prevail with us.* (33 Cong. Rec., 5522.)

Subsequently Mr. Loud said, in response to the questions of other gentlemen as to the attitude of other States:

> I do not think there will be any objection in Oregon and Washington, where they have to burn timber to get rid of it.

The amendment excluding California was agreed to, as well as the other amendments, and the bill was passed. (33 Cong. Rec., 5522, 5523.)

It is thus apparent that Mr. Loud's objection was to any sale of timber on the forest reserves in California, and his purpose in insisting on the amendment excluding California from the operation of the act was to prevent any further sales there. There is no intimation anywhere that he or anybody else desired to take California out of the operation of any other provisions of the act of June 4, 1897. On the contrary, the provisions of that act and the scheme of administration of the forest reserves established by that act are of a character to accomplish just the purpose which Mr. Loud declared.

The bill as passed by the House was passed by the Senate on June 4, 1900 (33 Cong. Rec., 6532), and was approved by the President on June 6, 1900.

From this history it is plain that the final proviso of the amendment of 1900 was intended, not as a proviso to the act of 1897, with the result of excluding California forest reserves from that act, but as a proviso to the amending act of 1900 itself, with the result merely of excluding California forest reservations from the general rules concerning sale of dead and matured timber.

(*d*) Practical executive construction opposes the idea that the act of 1900 extinguished all of the act of 1897 as respects forest reservations in California. Since 1900, no less than before, the Department of Agriculture and the Bureau of Forestry have con-

tinuously and uniformly treated the act of 1897 as still applying to the California forest reservations, with the single modification concerning sales of dead and matured timber made by the act of 1897.

In the Forest Reserve Manual, approved by the Secretary of the Interior April 12, 1902, on page 14, under the heading "Sale of timber in forest reserves," paragraph 6, referring to applications for the purchase of timber, reads:

> If approved, the timber will be advertised in a local paper for thirty days (sixty days in California).

Paragraph 8 reads:

> At the end of thirty days (sixty days in California) the timber will be awarded to the highest bidder, etc.

These regulations were based upon the departmental view that the sixty-day rule prescribed by the act of 1897 was still in force in California.

After the passage of the amending act of 1900 the General Land Office continued to administer the forests in California under the act of June 4, 1897, just as it had before. The reports of the Commissioner of the General Land Office for 1901 (p. 129), for 1902 (p. 384), for 1903 (pp. 286, 289, 290), for 1904 (pp. 302, 303, 306, 307), all show that grazing was being constantly controlled by the permit system in California as elsewhere, and also that timber sales were being made and free use of timber granted under the permit system on the forest reserves in California.

The reports of the Forester of the Agricultural Department for 1906 (pp. 16 and 19), and for 1907 (pp. 27 and 31) also show that the act of 1897 and the regulations made thereunder were being enforced in the national forests in California as elsewhere.

In other words, the practical construction by the department having administration of the forest-reserve laws was that the amending act related only to the method of advertising timber sales and that California was excepted from the operation of the amendment.

Congress itself has never questioned or interfered with this practical application of the act of 1897 at all times by the appropriate executive departments to the California forest reservations; and such failure to object or interfere shows congressional acquiescence in the continued applicability of the act of 1897 to California.

(*e*) Congress, indeed, inserted this clause in the act of June 30, 1906 (34 Stat., 669, 684)—

> and hereafter sales of timber on forest reserves in the State of California shall in every respect conform to the law governing such sales in other States, as set forth in the act of June sixth, nineteen hundred.

Here is an express description of the act of 1900 as a "law governing (such) sales" of timber on forest reservations; and in that light evidently the act has always been viewed by Congress. Further, does not this act of 1906 manifest that Congress then supposed the forest reservations in California to be under like

general rules with such reservations elsewhere, except in the single matter of sales of timber? Was not the act of 1906, just quoted, intended to undo all that was supposed by Congress to have been done in the act of 1900?

(*f*) The Commissioners to Revise and Codify the Laws of the United States, in their final report of December 19, 1906, to Congress betrayed no thought that forest reservations in California had been taken out of the operation of the act of 1897. They deal with the subject of "national forests" in Title XXII, chapter 13, and therein repeat the provisions of the act of 1897 in reference to all forest reservations, without any exception of California. (Revision of the Laws of the United States, pp. 74–76.) The stated revision, as is well known, is being made under the direction of a joint committee of the two Houses of Congress, and their treatment of the matter in hand has persuasive force.

(*g*) Private titles to land will be invalidated extensively and disastrously if it can now be held that since 1900 the act of 1897 has had no application to forest reservations in California. For example, the act of 1897 says that—

> any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. (30 Stat., 36.)

Many and valuable mineral entries have been made in California since 1900 under this law; and they are void if the law no longer embraces California.

Again, this act of 1897 provides that—

> in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. (30 Stat., 36.)

Many such relinquishments of lands within California forest reservations have been made, and many entries of lieu lands have been founded on such relinquishments, since 1900. They are all invalid if the act of 1897 was repealed as to California by the act of 1900.

If, then, the operation of the act of 1900 can possibly be restricted to the single subject of sales of dead and matured timber, it surely must be. This brings us to a consideration of the three verbal inquiries stated at the beginning.

1. The words "this act" in the last proviso of the act of 1900 relate to that act itself, and not to the act of 1897. If the quotation marks bounding what purports to be inserted by the amendment in the act of 1897 were found at the beginning instead of the end of the last proviso in the act of 1900, the matter would be clear. Only the part preceding such last proviso would then be properly transferable to the act of 1897; and the last proviso itself would be an obvious statement that the amending provisions of the act of 1900 should not be applied to the act of 1897 in the case of California reservations. It needs no citation of authorities, however, to support the rule that marks of punctuation in a statute have no controlling force. They may be eliminated or altered; and *a fortiori* their place may be changed. Quotation marks, instead of having more sanctity than other punctuation, have rather less, for they do not enter at all into the sentence construction. If only the large considerations of policy and propriety which have already been adduced were available to show error in the placing of the quotation marks at the end of the last proviso in the act of 1900 instead of at its beginning, those considerations would suffice; but the growth of this act of 1900 in Congress affords simple and immediate reason for correction of the punctuation.

The history of the bill's progress to its final form has already been given. It appears that the last proviso was not a structural part of the original bill

or of any other amendments to the bill, but came in as a separate thing on final passage of the bill. It might well, therefore, be a restriction of the operation of the amending act itself, instead of being a part of the language to be inserted in the act of 1897 in lieu of the other sentences of that act which were stricken out by the act of 1900. The quotation marks, in other words, might well and properly go before, rather than after, the final proviso.

Additionally, the placing of the quotation marks must have been the act of a clerical employee of the House, instead of appearing in the bill as originally introduced or in the bill as proposed by the Committee on Public Lands. This makes acute the absurdity of attaching any stress to the presence or place of the quotation marks.

In the Senate the bill passed without alteration from its final House form. (Cong. Rec., 56th Cong., 1st sess., vol. 33, pt. 7, pp. 6531, 6532.)

2. In any event, "the provisions" which the act of 1900 makes inapplicable to California forest reservations are only the sale clauses, which are the subject both of the act of 1900 and of that paragraph of the act of 1897 into which the act of 1900 introduced some changes. Though these words—"the provisions of this act"—*may* mean all provisions of the act, it does no violence to the language to interpret it as meaning only such provisions as formed the subject of the amending act and of the paragraph of the original act which was amended, viz, the

provisions concerning sale of dead or matured timber.

Holy Trinity Church v. *United States* (143 U. S., 457).

Law Ow Bew v. *United States* (144 U. S., 47, 59).

General language is often narrowed by interpretation.

3. The very nature of the last sentence of the act of 1900 as a *proviso* both justifies and requires limitation of its language to the provisions concerning sales of timber, to which the proviso was appended. The true office of a proviso is to make an exception from, or to put a qualification upon, the language to which the proviso is added. The proviso under consideration was annexed to a bill dealing only with sales of timber. It is true that (unless the quotation marks were wrongly placed, as above submitted) it was required to be carried into the body of the act of 1897; but it went there by force of the act of 1900 and with the signification which it should receive as a part of such act of 1900, appended to mere regulations of timber sales.

The three provisos in the act of 1900 which precede the final proviso relate only to timber sales. The final proviso should be considered to have the same subject in mind, and no more.

From the legislative debates, as well as the successive changes in the act of 1900, it has already been shown that never was any topic whatever but the regulation of timber sales in the mind of anybody

during the progress of the enactment. (Cong. Rec., *passim, supra.*) The report of the House Committee on Public Lands shows the same. (House Report No. 178; 56th Cong., 1st sess.) Such report may properly be considered as a guide to interpretation of the statute.

Oceanic Navigation Co. v. *Stranahan* (214 U. S., 320, 333.)

II.

The departmental regulation, forbidding stock grazing on a forest reservation without a permit from the department, is a valid exercise of administrative power; because Congress itself has fixed the general rule to which the department regulations must conform—or, in other words, Congress itself has defined the fundamental ends, viz, protection and improvement of the forests on the reservation, to which the regulations must be subordinate means—and the particular regulation as to stock grazing, which is here involved, conforms to the congressional rule and fairly promotes the designated congressional ends.

1. The act of June 4, 1897, expressly declares at the outset that the objects of a forest reservation are "to *improve and protect* the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." (30 Stat., 35.) These purposes reduce fundamentally to the protection and improvement of the forests; for the supply of timber to the public and the maintenance of favorable conditions of water flow are secondary results.

The rules and regulations prescribed by the executive department concerning the conduct of a forest reservation can not, therefore, be arbitrarily adopted in disregard of the fundamental rule established by Congress itself for their general nature and operation. They must meet the congressional standards by being relevant to the declared congressional purposes, or be void. They must be fairly promotive of such purposes. The rules and regulations are required by Congress to be subordinate to, and to operate only as supplemental details of, the general principles which Congress has itself announced. The adoption of such subordinate and supplemental rules is not legislation, but proper administration. The regulations do no more than make specific application of the controlling principles fixed by Congress. They express particulars which the general declaration of the legislature comprehends. The cases which might be cited from the decisions of this court on the point in hand are very many; but the following are leading and will suffice:

In re Kollock (165 U. S., 526, 533, 536).
Buttfield v. *Stranahan* (192 U. S., 470, 492).
Union Bridge Co. v. *United States* (204 U. S., 364).

The oleomargarine act, considered in the *Kollock* case, required packages of oleomargarine to be "marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe" (p. 528). The Commissioner of Internal Revenue promulgated rules defining particularly the nature and manner of the

marking; there being no description of those matters in the statute itself. The Chief Justice said that the action of the Commissioner was "merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer" (p. 536).

And it may at once be noticed that a sale of oleomargarine in packages not marked in compliance with the rules of the Commissioner of Internal Revenue was punished as a crime in this *Kollock* case.

In *Buttfield* v. *Stranahan*, *supra*, the statute in its first section made it unlawful "to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited." Section 3 of the same act provided that the Secretary of the Treasury, upon the recommendation of a board of tea experts, should "fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States" (p. 494). The establishment of such standards for tea was held a proper administrative act; and destruction of the teas involved in the case was upheld, for noncompliance with the Treasury standards.

In *Union Bridge Co.* v. *United States*, *supra*, the statute declared that the Secretary of War might require alteration of any bridge at its owner's ex-

pense if the bridge were "an unreasonable obstruction to navigation." The power conferred upon the Secretary of War to determine the "unreasonableness" of the obstruction by the bridge was held not legislative, but administrative; and none the less so, though refusal to obey the Secretary of War's decision was made by the statute a criminal offense.

2. The regulation about stock grazing, which is here involved, is fairly and importantly pertinent to the declared congressional objects of protecting and improving the forests.

(*a*) The system of permits affords a method of supervision of applications for grazing privileges and determination of the responsibility of applicants.

(*b*) Knowledge of all persons using the reservation, through the issued permits, and a resultant opportunity to identify offenders against protective rules about fires, timber cutting, etc., is of obvious importance.

(*c*) The number of cattle or sheep allowed to graze upon the reservation at one time has to be controlled.

(*d*) Grazing often should be restricted to proper seasons of the year, so as to save young growth of shrubbery and trees, and indeed to protect the health of the soil.

More than mere suggestion of *some* ways in which this regulation may conserve the forest is unnecessary, as the appropriateness of the Secretary's regulation should be presumed in the absence of contrary showing. The regulation certainly will not be held irrelevant to the congressional rule, that the forest be preserved and improved, upon demurrer and without

evidence, unless the impropriety of the regulation is demonstrable on a ground which evidence can not meet.

III.

In refusing permits to use a forest reservation for stock grazing except upon stated terms or in stated ways, the Secretary of Agriculture merely asserts and enforces the proprietary right of the United States over land which it owns. The regulation of the Secretary, therefore, is not an exercise of legislative, or even of administrative, power; but is an ordinary and legitimate refusal of the landowner's authorized agent to allow persons having no right in the land to use it as they will. The right of proprietary control is altogether different from governmental authority.

1. Congress has not itself given to the public the right of grazing sheep on forest reservations. The act of 1897 does give certain privileges of use, e. g., the use of timber and stone "by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes." It also says that nothing in the act shall "prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations." (30 Stat., 36.) But—

(*a*) "Entering * * * for all proper and lawful purposes" does not include consumption of the undergrowth and grass by stock.

(*b*) The "proper and lawful purposes" are those sanctioned by other express statutes.

(*c*) In any event, all use of the reservation under this clause is expressly conditioned upon obedience to "the rules and regulations covering such forest reservations." If anybody uses the land in contravention of such regulations, the statute in that case gives him no leave, and he is a trespasser as much as if there were no statute giving him the privilege of use in any case or way.

2. It results that the statute, in empowering the Secretary to regulate the occupancy and use of the forest reserve, gives to him as agent of the United States, which owns the land, the right to forbid, or to impose conditions upon, the use of the reserve in any way not specifically authorized by Congress itself, as in taking timber or stone for particular purposes, or in entering and developing mineral portions. The Secretary, in prohibiting stock grazing upon the reservation without a permit, does only the same thing as any landowner's agent when he refuses, in behalf of the owner and in the exercise of the owner's right, to let people generally use the land.

3. How is this regulation of the Secretary an exercise of any governmental power? The United States, as owner of the land, can refuse to others the privilege of using it. Congress, as general administrator of the property of the United States, can withhold the use of such property; and can insist, with or without reason, upon the property's lying wholly idle. It therefore can say that nobody may use the land without the

consent of the Secretary of Agriculture—or, for that matter, of anybody else—as agent appointed by Congress for the United States as owner.

The power granted to the Secretary of Agriculture, at least in respect of the regulation here involved, is merely to assert or to waive the landowner's exclusive right over his property.

Suppose that Congress should empower the Secretary of the Interior to lease portions of the public domain if he should deem it advisable and should procure terms considered by him satisfactory. Would that be a delegation of legislative power, or even a grant of administrative authority—or, rather, an appointment of a managing agent for exercise of part of the proprietary rights of the United States? This act of June 4, 1897, which empowers the Secretary of Agriculture to prescribe the terms or conditions upon which the public may use part of the public domain, is not different.

IV.

The regulation of the Secretary of Agriculture being a valid restriction upon use of the forest reservation, which all persons may lawfully be required by Congress to obey, it was permissible for Congress to sanction its requirement of general obedience to that regulation by expressly making disobedience punishable criminally. The crime of violating the regulation is not created by the Secretary of Agriculture, but by Congress itself.

This point should be given two independent treatments: First, in view of the regulation as a valid administrative order; and, second, in view of the

regulation as a refusal by the landowner's agent to consent to use of the land by others than the owner, except on stated conditions.

1. Considering the regulation as an administrative order—

The question of criminal sanction is really settled by—

In re Kollock (165 U. S., 526).

Union Bridge Co. v. *United States* (204 U. S., 364).

Caha v. *United States* (152 U. S., 211).

United States v. *Bailey* (9 Peters, 238).

In each of the first two of these cases a criminal conviction was sustained for violation of an administrative order. The *Caha* and *Bailey* cases also seem to involve the very point, for in the *Caha* case a conviction of perjury was upheld when the false oath was taken in a proceeding authorized only by administrative regulation, and in the *Bailey* case a conviction of perjury was sustained when the false oath was taken before an officer whom a Treasury regulation alone authorized to administer the oath.

Nothing to the contrary of the foregoing cases or of the contention here made was involved in *United States* v. *Eaton* (144 U. S., 677). In that case an indictment against a wholesale dealer in oleomargarine for failing to keep such books and make such returns as were required of him by a regulation of the Commissioner of Internal Revenue was held bad because nothing in the statute made a violation of the regulation of the Commissioner criminal unless it was, within

section 18 of the statute, a neglect or refusal "to do or cause to be done any of the things *required by law*" in the conduct of the indicted party's business. The decision was that the language "required by law" must be taken to refer to things required by the statute itself, and not to things required only by regulation of the Commissioner, there being nothing in the statute then considered which expressly made a violation of regulation criminal, as does the statute involved in the present case. The *Eaton* case, in other words, involved merely a construction of the scope of the words "required by law" in the statute then under view, and presented no question whether the statute would have been valid if it had unmistakably made it a crime to transgress the commissioner's regulation. Beyond that, the oleomargarine act, considered in the *Eaton* case, in terms (section 5) required every manufacturer of oleomargarine to keep books and make returns as the Commissioner's regulation required of wholesale dealers, but itself made no such requirement of wholesale dealers. The power of the Commissioner under section 20 of the act to "make all needful regulations for the carrying into effect of this act" (p. 685) perhaps did not reach to such a regulation as he had made.

The very question now presented to the court, whether a criminal indictment lies for transgression of the department regulation concerning stock grazing upon a forest reservation, was answered in the affirmative in 1898 by Solicitor-General Richards. (22 Opin. Atty. Gen., 266.)

Among the decisions of the lower Federal courts pertinent to the matter in hand, the following upheld the Secretary's regulation as valid for civil purposes:

Dastervignes v. *United States* (122 Fed., 30).
United States v. *Dastervignes* (118 Fed., 199).
United States v. *Shannon* (151 Fed., 863).

The following have held indictment for violation of the regulation supportable:

United States v. *Deguirro* (152 Fed., 568).
United States v. *Domingo* (152 Fed., 566).
United States v. *Bale* (156 Fed., 687).

On the other hand, the following held such an indictment bad:

United States v. *Blasingame* (116 Fed., 654).
United States v. *Matthews* (146 Fed., 306).

2. Treating the regulation as a refusal by the owner's agent to consent to the use of the land by others, unless they procure a permit—

The congressional enactment, that use of the land in violation of regulation should be a crime, then comes to merely this: That use of the land after refusal of the owner's consent shall be a criminal trespass. The absence of assent by the owner to the entry or use is but one element of fact among the several which Congress has declared shall together constitute a criminal offense. The rule of criminal liability is fixed by Congress; and its essential factors are defined by the legislature.

It is, of course, within the congressional power to make trespass on United States lands a crime. Willful trespass upon private lands has often been made

criminal by state legislatures. In every such case the absence of consent of the landowner to the entry is but a fact whose existence characterizes the entry as unlawful. The act of Congress, in the view now presented, means the same as if it read: "It shall be a crime to enter upon or use forest lands of the United States after refusal of the consent of the Secretary of Agriculture." What is that but an exact analogue of the law of larceny, which is that it shall be a crime to take another's personal property *without his consent* in a purpose of appropriating it? Or of embezzlement? Or of rape, which is the crime of unlawful sexual use of a woman's person *without her consent?*

The judgments sustaining the demurrers to the indictments should be reversed.

LLOYD W. BOWERS,
Solicitor-General.

FEBRUARY, 1910.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PIERRE GRIMAUD AND J. P. CARAJOUS. } No. 241.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ANTONIO INDA. } No. 242.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

Congress has power to enact legislation for the protection of its public lands, and, if it deems advisable, has the power to enact criminal laws to prevent trespasses thereon.

This principle is so obvious and well settled that it hardly needs mentioning.

In *Camfield* v. *United States* (167 U. S., 518, 525) this court had before it a statute making it unlawful to erect or maintain inclosures of public lands, and action was brought in equity to compel the removal

82070—11——1

and abatement of a fence erected in such way as to inclose a large body of public lands, though the fence was actually located upon lands not belonging to the Government. After declaring the principle that the United States had the power to protect its lands, coextensive with any private individual, the court further said:

> Considering the obvious purposes of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon lands of a private individual. *The General Government doubtless has a power over its own property analagous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.* If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public

> lands, *though it may thereby involve the exercise of what is ordinarily known as the police power*, so long as such power is directed solely to its protection. A different rule would place the public domain of the United States completely at the mercy of State legislation.

Such power necessarily belongs to the United States under article 4, section 3, clause 2, of the Constitution, which provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

By this clause of the Constitution express authority is vested in the United States, *in its sovereign capacity*, to make the needful rules and regulations respecting its property, and that regardless of the particular locality in which it may be situated. Each State, by its adoption, relinquished to the United States the power to deal with such property in such way as it might deem proper, though such property might, at the time, be located within the territory of a State.

In pursuance of this power, Congress has repeatedly passed acts, not only for the protection of its lands, but also of its personal property, as, for illustration, by act of Congress, it is made a felony to embezzle Government funds, regardless of where such embezzlement may take place.

II.

Under the decisions of this court, a violation of the regulations prescribed by the Secretary of Agriculture upon which and the statute authorizing its enactment this indictment is based, constituted an offense, and rendered the offender liable to punishment in accordance with the terms of the statute.

In view of the earnest and able supplemental brief filed by defendant in error, a more extensive review of the decisions of this court bearing upon the question than appears in the brief filed at the last term by the late Solicitor General is believed to be justified.

It is respectfully insisted that there is not a decision of this court, when properly analyzed, which sustains the position contended for on behalf of defendant in error.

In *United States* v. *Bailey* (9 Pet., 238, 252, 254, 256, 257) the defendant was indicted under a statute making it an offense for one to swear falsely in support of any claim against the United States. There was evidence introduced on the trial tending to prove, among other things, that after the passage of an act entitled "An act to provide for liquidating and paying certain claims of the State of Virginia," the Secretary of the Treasury established regulations for the government of the department and its officers in their actions in connection with such claims, and under these regulations affidavits made and subscribed before justices of the peace in any of the States were

received and considered in proof of the claims; and that defendant made an oath in support of such a claim before a justice of the peace in Kentucky.

It is stated in the opinion of the court that "it is admitted that there is no statute of the United States which expressly authorizes any justice of the peace of a State, or indeed any officer of the National Government, judicial or otherwise, to administer an oath in support of any claim against the United States under the act of 1832, chapter 173. And the question is, whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing, within the true intent and meaning of the act of 1823, chapter 165." The third section of the act mentioned provided:

> That the Secretary of the Treasury be, and he is hereby, directed and required to adjust and settle those claims for half pay of the officers of the aforesaid regiment and corps which have not been paid, etc.

And it was under this very general statute that the regulations in question were adopted.

The court held that:

> The false swearing and false affirmation referred to in the act ought to be construed to include all cases of swearing and affirmation *required by the practice of the department*, in regard to the expenditure of public money, or in support of any claims against the United States.

And further said:

> Upon the whole, we are of opinion that where the oath is taken before a State or national magistrate authorized to administer oaths, *in pursuance of any regulations prescribed by the Treasury Department*, or in conformity with the practice and usage of the Treasury Department, so that the affidavit would be admissible evidence at the department, in support of any claim against the United States, and the party swears falsely, the case is within the purview of the act of 1823, chapter 165.

There is, of course, a distinction between the facts of that case and the present one, but the principle involved was precisely the same.

Congress there had enacted a general law against false swearing, but had enacted no law declaring it an offense under that statute to make a false affidavit before a justice of the peace of a State, in support of a claim against the United States under the act authorizing the liquidation of the Virginia claims. The Secretary of the Treasury, however, had promulgated a regulation making such affidavits admissible in the adjustment of these claims, *and it was by virtue of that regulation that the making of this affidavit became an offense.* If resort had been had to the act alone, there was nothing appearing therein making the swearing to the affidavit an offense; *and before the promulgation of the regulation, it was not an offense,* and it was necessary in describing the offense in the indictment to allege that such regulation existed and that the affidavit had been made in pursuance thereof.

The vital principle there held was, that a certain act upon the part of a person became a criminal offense in consequence and by virtue of a regulation adopted by the Secretary of the Treasury, and that the Secretary's action in adopting such regulation was essential to the existence of the offense.

A similar case is that of *Caha* v. *United States* (152 U. S., 211, 218). Caha was indicted for perjury committed in the land office at Kingfisher, Okla., in falsely testifying that he was on a sand bar in the South Canadian River at 12 o'clock noon, on the 22d of April, 1889, which testimony was given in a contest pending in the land office under a regulation of the Interior Department. After reviewing the various statutes relating thereto, the court said:

> We have therefore a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land; a specific act of Congress authorizing contests before the local land offices in cases of preemption; *rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both preemption and homestead entries;* and the frequent recognition by acts of Congress of such contests in respect to homestead entries. Clearly, then, within the scope of section 5392, the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.

Here, again, was an offense committed which depended for its existence upon regulations adopted by an executive department under a general statute, and which would not have been an offense had not the oath in question been recognized and authorized under those regulations.

It is true that Mr. Justice Brewer, in drawing a distinction between that case and the case of *United States* v. *Eaton* (144 U. S., 677), said:

> This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of section 5392.

But it is submitted there can be no difference in principle between a department's creating one essential element of an offense and its creation of another essential element; and, moreover, in the subsequent case of *In re Kollock* (165 U. S., 526) the conviction was based upon the violation of a regulation of a department. This expression, of course, was mere *dictum*, and had no material bearing upon the decision of the case.

The case of *United States* v. *Eaton* (144 U. S., 677, 688) is cited and relied upon by defendant in error; but it is, in fact, weighty authority in support of the contention of the United States. The defendant Eaton was prosecuted for violating a regulation

adopted by the Secretary of the Treasury to carry into effect an act of Congress relating to the manufacture and sale of oleomargarine, the specific offense charged being that the regulation required certain books to be kept, which defendant unlawfully failed to do. The act authorized the Secretary of the Treasury to make proper rules and regulations for the enforcement of the act, and section 18, among other things, provided that if any manufacturer or dealer in oleomargarine should knowingly or willfully omit, neglect, or refuse to do, or cause to be done, "*any of the things required by law* in the carrying on or conducting of his business" he should pay a penalty of $1,000.

This court based its decision *entirely* upon the fact that the statute did not in specific terms make the violation of a *regulation* adopted by the Secretary an offense. This clearly appears from the following language of the court:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. *If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.*
>
> Regulations prescribed by the President and by the heads of departments, under authority

> granted by Congress, may be regulations prescribed by law, so as to lawfully support acts done under them and in accordance with them and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing required by law as to make the neglect to do a thing a criminal offense in a citizen, *where a statute does not distinctly make the neglect in question a criminal offense.*

This language clearly shows that it was then the opinion of this court that, if the statute had specifically made a violation of the regulations adopted by the Secretary an offense, the action would have been maintainable; and therein lies the distinction between that and the present case, as here the statute does in the most explicit terms declare that the violation of the regulations to be adopted by the Secretary of Agriculture shall be a misdemeanor. Consequently, the principle there declared by the court is directly in point, and supports the contention of the United States in the present case.

In re Kollock (165 U. S., 526, 533) conclusively confirms the view expressed in the Eaton case. Kollock was indicted under another section of the same statute. The parts of the statute essential in that case, and the point presented, and the conclusion of the court thereon, were thus stated by Mr. Chief Justice Fuller in delivering the opinion of the court:

> By the terms of the act manufacturers of oleomargarine are required to pack it in wooden packages "*marked, stamped, and*

branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe;" and all sales by manufacturers and wholesale dealers must be in "original stamped packages." Retail dealers are required to "pack the oleomargarine sold by them in suitable wooden or paper packages, *which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.*" And fine and imprisonment are denounced on "every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form *than in new wooden or paper packages as above described, or who packs in any packages any oleomargarine in any manner contrary to law, or who falsely brands any package* or affixes a stamp on any package denoting a less amount of tax than that required by law."

Kollock was convicted as a retail dealer in oleomargarine of knowingly selling and delivering one-half pound of that commodity *which was not packed in a wooden or paper package bearing thereon any or either of the marks or characters provided for by the regulations and set forth in the indictment.* It is conceded that the stamps, marks, and brands were prescribed by the regulations, and it is not denied that Kollock had the knowledge, or the means of knowledge, of such stamps, marks, and brands. *But it is argued that the statute is invalid, because it "does not define what act done or omitted to be done shall constitute a criminal offense," and delegates the power "to determine what acts shall*

be criminal" by leaving the stamps, marks, and brands to be defined by the commissioner.

We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not; and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps, and brands to be used. The criminal offense is fully and completely defined by the act, and the designation by the commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense.

Here, like in the other cases above cited, the language of the statute was of itself wholly insufficient to create the offense, there being nothing therein which indicated that it was illegal to sell a package branded as the package sold by Kollock was branded; and it was necessary, before one could know whether he was guilty of an offense in selling oleomargarine so branded, for him to resort to and read the requirements of the regulations of the Commissioner of Internal Revenue. *Moreover, the sale of oleomargarine in the manner in which it was sold by Kollock*

was not an offense upon the enactment of the statute, and did not become so until the particular regulation violated was adopted.

A case which, if possible, is more directly in point is that of *United States* v. *Breen* (40 Fed., 402), which was decided by Mr. Justice Lamar while on the circuit, the decision being concurred in by Judge Pardee. By act of Congress the Secretary of War was authorized to make such rules and regulations as might be necessary to protect the improvements then being made on the South Pass of the Mississippi River, and to prevent any obstructions to the Pass or injury to the work then being done by the Government. The act further provided that any violation of the *rules and regulations* so made should constitute a misdemeanor against the United States, and that upon conviction the offender should pay a fine not exceeding $500 and be imprisoned not exceeding six months, at the discretion of the court.

The Secretary of War had adopted a regulation by which steam vessels navigating the South Pass were required to reduce their speed to not exceeding 10 miles per hour, and from the pilot's station at Pica-yune Bayou to the sea end of the jetties the speed should not exceed 6 miles per hour; and defendant was indicted for violating this regulation. To the indictment a demurrer was filed; and the learned justice, in disposing of the case, said:

> If the law empowered the Secretary of War by rule or regulation to make a certain act criminal, and punishable as such, then this

prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime, and punishable. All that the Secretary is authorized to do is to make the rule and regulation. It is the act of Congress which declares that the unlawful and willful violation of such rule and regulation, after it is promulgated, shall be held a misdemeanor by the person violating the same, and that such person shall be sentenced to pay a fine not exceeding $500, and shall suffer imprisonment not exceeding six months, as a penalty therefor. Numerous acts of Congress have been passed authorizing the Postmaster General, and other members of the executive department, to make rules and regulations for the business pertaining to their respective departments, and declaring that, when made and promulgated, a willful and unlawful violation of them should be held a crime against the United States, and the violators punished as prescribed in the act. The Supreme Court of the United States is authorized by act of Congress to adopt certain rules for the government of the inferior courts, which when made have the force and effect of law as much as if such rules were directly enacted by Congress and approved by the President. The same effect is to be given to the rule and regulation made by the Secretary in this case. The act of Congress denounces the violation of it as a crime, and prescribes the penalty. The criminality of the violation of the rule, and the liability of the offender to indictment and to punishment upon trial and conviction, result directly and exclusively from the legislation of Congress.

This language of the court is just as applicable to the present case as to that one. In fact, there can be no distinction whatever in principle between the two cases.

The defense in each of the above cases was based upon the alleged principle that in enacting a criminal law Congress must itself define and describe *all the essential ingredients of the offense.* But in each this theory was rejected, and it was held that it is essential only that Congress declare the offense, but that it may delegate to a proper officer, in the performance of his official duties, the power to prescribe certain elements which shall enter into the offense.

To hold that a violation of the regulation in question was not a criminal offense, when its adoption by the Secretary of Agriculture was specifically authorized, and the violation of which, when adopted, was by express language of the statute declared an offense, would be far-reaching in its effect and most disastrous to the public welfare; as it is absolutely impossible for Congress to enter into detail as to the method of enforcing many of its most important and beneficent laws; and such details must be intrusted to the sound discretion of the heads of its departments, who are able to adjust those details to varying conditions as they arise; and it is apparent that the enforcement of regulations of this character is practically impossible without a penalty attached to their violation.

St. Louis, Iron Mt., etc., Ry. v. *Taylor* (210 U. S., 281) also sustains the principle here contended for.

There a civil action was maintained upon the violation of a rule established on a finding of the American Railway Association as to the standard height of drawbars. While that was a civil action yet the principle is the same, as Congress can no more delegate power to create civil liability than it can to create a criminal offense.

III.

The act of Congress under which the Secretary of Agriculture promulgated the regulation in question did not involve an improper attempt to delegate legislative power to an administrative officer.

(1) In the first place, it is impossible to arrive at a clear definition of legislative and executive power in accordance with which specific powers, which it is desirable should be exercised, may be unquestionably denominated as legislative or executive. In the second, it is inexpedient.

As it was said in *Brown* v. *Turner* (70 N. C., 93, 102), while—

> the executive, legislative, and supreme judicial powers of the Government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore while each should firmly maintain the essential powers belonging to it, it can not be forgotten that the three coordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of what seems to be a "common cause of vicinage" bordering on the domains of each.

So far as this necessarily vague definition of powers has been possible, it has been recognized by this court as follows:

> The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done; to the latter no objection can be made. (*Union Bridge Co.* v. *United States*, 204 U. S., 364, 382–383.)

Applying that here, it is seen that not only has Congress itself fixed the general rule to which the department regulations must conform in that it has defined the fundamental end, that is, the protection and improvement of the forests on the reservation; it has also indicated the sort of means that are to be employed to those ends; for, after giving the authority to the Secretary, it has enacted that "he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, *to regulate their occupancy and use*, and to preserve the forests thereon from destruction." Regulation 45 is very clearly within the terms of this limitation; indeed it would be difficult to conceive of a regulation looking to the "occupancy and use" of the reservation more accurately conforming to this direction of Congress. And it has been pointed out in the main brief prepared by the late Solicitor General how the regulation serves the other direction

laid down by Congress, "to preserve the forests thereon from destruction" (p. 32).

The promulgation of regulation 45 therefore is but the exercise of an authority or discretion as to the *execution* of the act of 1897, and it is clearly done in pursuance of that act, within the above definition.

Or, as it was put by the Circuit Court of Appeals, Ninth Circuit, in the *Dastervignes Case* (122 Fed. 30, 34):

> The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not make any law, but he exercised the authority given to him and made rules to preserve the forests on the reservations from destruction. Such rules, within constitutional limits, have the force and effect of law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress. As was said by the court in Locke's appeal (72 P., 491, 499; 13 Am. Rep., 716):
>
> "To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

These principles governing the limitations on legislative and executive power have been recognized by this court in many cases, notably in *In re Kollock*, *Buttfield* v. *Stranahan*, and the *Union Bridge Co.'s case*, supra.

West v. *Hitchcock* (205 U. S., 80) also has a bearing here. The question was as to an allotment from the lands of the Wichita Band of Indians under the act of March 2, 1895, ch. 188, and there was involved in the decision a ruling by the Secretary of the Interior that the claimant was not a member by adoption of this band of Indians. It was contended that the Secretary had no power to make this ruling, and that even if he did it was subject to review. The ruling in question was made under a regulation of the Department of the Interior, which in turn was issued in pursuance of sections 441 and 463 of the Revised Statutes. Section 463 reads as follows:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations.

Mr. Justice Holmes, in delivering the opinion of the court, said on this point:

> We are disposed to think that authority was conferred by the general words of the statutes. * * * We should hesitate a good deal, especially in view of the long-established practice of the department, before saying that this language was not broad enough to warrant a regulation obviously made for the welfare of the rather helpless people concerned. The power of Congress is not doubted. The Indians have been treated as wards of the Nation. Some such supervision was neces-

> sary, and has been exercised. In the absence of special provisions naturally it would be exercised by the Indian Department.

The result was that mandamus to the Secretary was denied the petitioner and his selection remained unapproved; that is to say, his rights were made dependent on *an executive regulation concerning adoption into an Indian tribe* and *promulgated in pursuance of the extremely broad language of the above-quoted section of the Revised Statutes.*

The cases upholding orders made by the Interstate Commerce Commission under very general definitions of authority from Congress are in point. For instance, the commission is given authority to establish rates that shall be "just and reasonable." The establishment of a rate is, of course, very different from the mere finding of a fact; in reality, a rule of action is set up to govern carriers in the future. Yet the only direction or limitation of discretion which Congress has placed upon the commission is that the rate shall be "just and reasonable." Surely this is as wide as the so-called delegation involved in the present case. And it is to be observed that a deviation by a carrier from the rate imposed by the commission may involve a criminal punishment. This power of the commission has been recognized so late as in the case of *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railroad* (218 U. S., 88). Compare also the opinion of Mr. Justice Woods, sitting on circuit, in *Tilley* v. *Savannah, etc., R. Co.* (5 Fed., 641), and of Mr. Justice Brewer,

on circuit, in *Chicago, etc., Ry. Co.* v. *Dey* (35 Fed., 866).

Even more striking is the delegation involved in the power of the commission to establish general regulations for carriers. *Interstate Commerce Commission* v. *Illinois Central Railroad Co.* (215 U. S., 452) held that the commission has power to issue an order regulating the distribution of cars by railroad companies, and yet the only direction or rule given by Congress to the commission under which this regulation could have been issued was "to determine and prescribe * * * what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier * * * shall conform to the regulation or practice so prescribed." Can such a delegation be upheld and that in the present case condemned?

Nor can there be any defense based on the unqualified point that criminal sanction can not in any event be given to an administrative rule, for, as heretofore pointed out, that question is really settled by a number of cases in this court. (See also *Willoughby, The Constitution*, sec. 781.)

But it may be profitable to look at the case from the angle suggested by the above contention and examine closely in its relation to law the physical act that is the subject of this indictment. It consisted in entering on the Sierra Forest Reserve with sheep and permitting them to graze. Of course the fact

that this was without a permit is but one of the factors in relating the physical act to law.

Such an act was unlawful irrespective entirely of regulation 45 or of any other rule of the department. It was an entry and trespass on the lands of the United States. (*Camfield* v. *United States, supra.*)

It is true the court said in *Buford* v. *Houtz* (133 U. S., 320, 326):

> We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and uninclosed, and no act of government forbids this use.

But the lands included in a forest reservation are no longer public lands within the purport of that doctrine, and the very law originally creating this forest reservation—entirely apart from the act now in question—is an "act of government" that "forbids this use." The creation of such a reservation severs the land from the public domain and appropriates it to a public use. (*Wilcox* v. *McConnel*, 13 Pet., 496, 512, 513.)

Laying aside other provisions of law, the defendants, therefore, were clearly guilty of a trespass and their only defense to that charge of unlawfulness must be predicated on later acts of Congress which granted certain privileges to use these reservations. But they can not bring themselves within

any of the classes of persons to whom such privileges were granted. They are not among any of those enumerated in the act of 1897 here in question. (See main brief, pp. 2–7.)

Then, to return to regulation 45, and applying even the narrow test proposed in *United States* v. *Moody* (164 Fed., 269), where it was said the controlling question is, have the rules adopted by the Secretary attempted to make unlawful that which, but for such rules, would have been lawful, it is clear no such attempt has here been made.

Regulation 45 is simply a regulation of the "occupancy and use" of the reservation, and, Congress, in making its violation a crime, is doing no more than saying that what was unlawful before under acts of Congress is now a criminal offense.

It is important to remember that in dealing with this subject of public forest lands and reservations we are dealing with a subject over which Congress has a much more exclusive power of control, and therefore a wider range of choice of means in the exercise of that power, than it has in respect to its more general functions under the Constitution. This principle has been recognized by this court in many instances. Thus, in respect to the question of immigration and the admission of aliens the theory has been that Congress has an almost exclusive power, and the cases go very far to show that any means selected by Congress in the exercise of that power will not be questioned. A long line of cases involving the exclusion of Chinese aliens by administrative

action under very broad authority from Congress attests to this. The recent case of *Oceanic Navigation Co.* v. *Stranahan* (214 U. S., 320) has a strong bearing on this principle. The consideration that led the court to sanction the action of Congress and of the Secretary in that case, namely, the exclusive control of Congress over the subject-matter in question, must lead to a recognition of the validity of the action of Congress in this.

Another instance is the power of the Secretary of War to prescribe rules and regulations for the government of the Army and the like authority of the Secretary of the Navy over his department. These rules have been sustained as having the force of law.

Ex parte Reed, 100 U. S., 13.
Smith v. *Whitney*, 116 U. S., 167.

In *Ex parte Reed* an officer of the Navy was found guilty by a court-martial of certain charges founded on a breach of regulations issued by the Secretary of the Navy and was sentenced to fine and imprisonment. This was sustained by this court.

This reservation is a sort of "private" governmental property, established for a governmental enterprise and in pursuance of a law passed in the exercise of a governmental function; it is like a public building—is like, for instance, a department building here at the seat of government. Regulation 45 is not, therefore, to be confounded with a law passed in the exercise of a direct and explicit function of Congress under the Constitution; it is rather to be brought into comparison with a rule issued in conformity with

an act of Congress by the Secretary for the protection of his own department building. If, for example, Congress had provided in general terms that the Secretary should establish regulations for the use of the building, and a person—let him be a private citizen not connected with the department staff—were arrested for breaking and entering, might not his guilt depend on whether or not he was there, and doing what he was, within the hours fixed by the Secretary for the use of the building, or with a permit from the Secretary to do the thing, or was acting in conformity with any other conceivable regulation of the Secretary?

See also on the general question *Cosmos Co.* v. *Gray Eagle Co.* (190 U. S., 301, 309), to the effect that the Land Department has power under Revised Statutes, sections 441, 453, 2478, to adopt regulations for the administration of the forest reserve act.

And see *Butte City Water Co.* v. *Baker* (196 U. S., 119, 125, 126), upholding the delegation by Congress of power to local legislatures to make rules and regulations for the disposal of mineral lands. Mr. Justice Brewer, speaking for the court, said:

> What is the ground upon which the validity of these supplementary regulations prescribed by a State is challenged? It is insisted that the disposal of the public lands is an act of legislative power, and that it is not within the competency of a legislature to delegate to another body the exercise of its power; that Congress alone has the right to dispose of the public lands, and can not transfer its authority

to any State legislature or other body. The authority of Congress over the public lands is granted by section 3, Article IV, of the Constitution, which provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The Nation is an owner, and has made Congress the principal agent to dispose of its property. It is inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are intrusted to the inhabitants of the mining district or State in which the particular lands are situated. While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature the determination of minor matters respecting the disposal of these lands (pp. 125, 126).

Roughton v. *Knight*, October term, 1910, No. 711, February 20, 1911.

IV.

The general theory of government that there should be no union between the several departments has no application to this case.

After citing the views of notable philosophers and statesmen with reference to the theory mentioned, learned counsel for defendant say:

> One can not hear the voices of these great founders echoing down through the history of our Republic without being impressed with the belief that they never intended that Congress, the creature of their work, should violate those principles by vesting in the same person the power of promulgating and also of executing a law.

This sounds well, but has no application to the statute under consideration, because the power to create an offense or to lay down a rule of conduct, the violation of which shall constitute an offense, and the power to punish that offense when committed, is not by this statute vested in the same individual or department of government. The Secretary of Agriculture has absolutely no power to adjudge who is guilty of violating his regulations, or to impose a penalty for its violation. Such a question must be submitted in the proper form, as has been done here, to a regularly constituted court, and it be by such court determined, after a deliberate and careful hearing, whether the charge preferred is sustained by proper evidence; and if the defendant be proven guilty as required by law, it is within the province of

the court to impose a penalty, and of the regularly constituted officials to see that the judgment of the court is executed.

The same criticism could equally well have been made of the statute involved in *Union Bridge Co.* v. *United States* (204 U. S., 364). Congress by act of March 3, 1899, vested the Secretary of War with authority, after giving proper notice, to determine whether or not any parties were obstructing the navigability of waterways of the United States, and if the Secretary should determine that such obstruction existed, and should direct its removal, it was made a misdemeanor not to comply therewith. It was insisted that this act was void because it undertook to vest power in the Secretary which could not be delegated by Congress; but this court, after a most careful consideration and exhaustive review of authorities, held that Congress could vest in the Secretary the power to perform the duties prescribed in that act.

That act, if the expression is applicable to an act of this character at all, is more obnoxious than the one involved, because there the Secretary of War is empowered, not to lay down a general rule as to the obstruction of navigable waters, but to determine in each particular case whether the navigability of the water is or is not obstructed, and to lay down a rule or make a decision with reference to a particular individual, the violation of which by such individual constitutes a misdemeanor. Of course, the reading

of that act revealed nothing to the Union Bridge Co., as to whether or not it had committed the offense for which it was indicted, as the offense consisted entirely in disregarding the finding of the Secretary and the order based thereon, which was not a general rule of conduct, but was applicable to that company alone.

An act which apparently could with greater justice be criticized for concentration of power, was the provision of the immigration act of March 3, 1903 (32 Stat., 1213, ch. 1012), which was passed upon by this court in *Oceanic Navigation Co.* v. *Stranahan* (214 U. S., 320, 332). By section 9 of that act, after making it unlawful for any person to bring into the United States any alien inflicted with a loathsome or contagious disease, it was provided that—

> if it shall appear to the satisfaction of the Secretary of the Treasury (Secretary of Commerce and Labor) that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company (bringing in such alien) shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section, and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted.

It was stated in the beginning of the opinion of the court, which was delivered by Mr. Justice (now Mr. Chief Justice) White, that the steamship company had paid the money under protest and involuntarily, because it was the only means by which it could obtain the vessel's clearance papers, and that the failure of the vessel to depart on time would have caused grave public inconvenience from the nonfulfillment of mail contracts, and would have entailed upon the company serious pecuniary loss consequent to the failure to carry out many other contracts.

There was a statute which vested in the head of a department the judicial power of determining whether or not the provisions of the act had been violated, and in a subordinate of that department the executive power of enforcing the collection of the penalty, and, like the act sustained in the *Union Bridge Co. case*, the decision of that officer related to a single transaction by one individual, and was not a general rule for the guidance of the public; yet this court held that this provision was valid.

V.

The fact that the Secretary has the power to change the regulations in question, and has from time to time had in force regulations different in some respects to the present one, does not render the act of Congress invalid.

Learned counsel, upon pages 53 and 54 of their brief, point out the particulars in which this regulation has been from time to time changed, and argue therefrom that it is improper that such authority

be vested in an official, as it renders it difficult for one to inform himself as to what the exact status of the law is.

Precisely the same argument would apply to each of the cases above cited. In the Kollock case the Commissioner of Internal Revenue and the Secretary of the Treasury, if they had seen proper, could have daily changed the regulations with reference to branding oleomargarine, and in all probability many changes therein were made. In the Bailey case the Secretary of the Treasury could have changed any number of times the regulations with reference to the State officers before whom affidavits of the character there in question could be made. Likewise, in the *Union Bridge Co. case*, after the Secretary of War had declared that a party was obstructing navigation, he might have reversed his ruling, and that which was theretofore an offense would no longer have been such.

It is a misconception, however, that the rule of law is not continuous. While certain ingredients which constitute the offense may be changed from time to time, yet the statute declares the offense to consist in violating the regulations adopted by the Secretary, and that declaration of the statute remains always the same.

Nor is there any merit in the claim that the defendant can not conveniently inform himself as to the status of the law. Such regulations are published and are continually kept on file in the Department of

Agriculture, and anyone may, when he sees proper, inform himself with reference thereto; and this can be done about as easily as one can search the Revised Statutes and determine therefrom what the law is upon any particular subject.

Moreover, one can easily avoid the violation of this statute by letting the Government's property alone. Private individuals have no vested rights in the lands of the United States, nor have they any legal right to make any use of them. All trouble can be avoided by recognizing the fact that these lands belong to the United States and by treating them just as the lands of any private individual would be treated; that is, by not trespassing thereon until permission is obtained from the proper authorities.

VI.

The Government's contention is sustained by the weight of authority among the lower United States courts.

(1) In addition to the cases cited in the main brief (p. 38) as upholding the validity of the Secretary's regulation for civil purposes there may be cited:

Shannon v. *United States*, (160 Fed., 870; C. C. A., 9th Circ., opinion by Judge Gilbert).

And the following have supported indictments for violations of the regulation:

United States v. *Rizzinelli* (182 Fed. 675; Dist. Ct., Idaho, Judge Dietrich).

Dent v. *United States* (8 Ariz. 413), decided on the authority of the Dastervignes case, and on the impres-

sion that that case went on the theory that its holding was applicable equally to criminal and to civil cases. (Opinion by Kent, C. J.)

(2) It is also worth while to consider the decisions in the lower Federal courts sustaining convictions of crime, and basing civil causes of action, on other statutes, and executive rules promulgated thereunder, in no wise distinguishable from those here attacked. Among those are:

United States v. *Reder* (69 Fed. 965; Dist. Ct., S. Dak., Judge Edgerton). This was an indictment for cutting timber from the mineral lands of the United States contrary to the provisions of the act of June 3, 1878, chapter 150, and of a regulation issued in pursuance of that Act by the Secretary of the Interior. The act authorizes certain classes of persons to cut timber on the mineral lands of the United States in certain States and Territories for purposes of building, agriculture, and mining, "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes." And the third section provided that:

> Any person or persons who shall violate the provisions of this act, or any rules or regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, etc.

The regulation issued by the Secretary for the violation of which the defendant was indicted provided that no person should sell timber cut from the min-

eral lands of the United States without taking from the purchaser a statement in writing as to purposes for which the same was intended to be used. It was held that the defendant was guilty of a misdemeanor.

United States v. *Williams* (6 Mont., 379; opinion by McLeary, J.). This was an action brought by the United States to recover the value of certain wood cut on public lands in violation of the act of June 3, 1878, chapter 150 (20 Stat. L., 88), just considered, and of a regulation issued thereunder. The cutting in question violated a regulation that trees cut should not be less than 8 inches in diameter. It was argued by the defendant that the act of Congress, in so far as it authorized the Secretary of the Interior to make rules and regulations, was unconstitutional. The court, however, held the act and regulation to be valid, and overruled the court below in sustaining a demurrer to the complaint.

United States v. *Price Trading Company* (109 Fed., 239; C. C. A., 8th Circ.; opinion by Judge Thayer). This case also involved the validity of a regulation of the Department of the Interior promulgated in pursuance of the same authority as in the two preceding cases, namely, the act of June 3, 1878, chapter 150. The regulation was as follows:

> (4) Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act, shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the

same or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or Territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use and for the purposes aforesaid.

(5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this department.

(6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or Territory where it grew.

The court recognized that this was a valid regulation under an authority validly conferred by Congress, and sustained the action on it.

United States v. *Ormsbee* (74 Fed., 207; Dist. Ct., E. D. Wis., Judge Seaman), section 4 of the act of August 17, 1894, chapter 295, provided as follows:

> That it shall be the duty of the Secretary of War to prescribe such rules and regulations for the use, administration, and navigation of any and all canals and similar works of navigation that now are or that hereafter may be owned, operated, or maintained by the United States as in his judgment public necessity may require. Such rules and regulations shall be posted in conspicuous and appropriate places for the information of the public; and every person and every corporation which shall knowingly and willfully violate such rules and regulations shall be deemed guilty of a misdemeanor, and on conviction thereof in any district court of the United States within whose territorial jurisdiction such offense may have been committed, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment (in case of a natural person) not exceeding six months, in the discretion of the court.

The regulation on which the indictment here was founded forbade any persons from drawing water from the locks and canals of the Fox River. It was held that there was involved no delegation of legislative power, and that the rules made by the Secretary, pursuant to the act, had the force of law, so that persons violating them were subject to criminal punishment under the provisions of the act. The court said:

If either this act of Congress which directs that "rules and regulations for the use, administration, and navigation" of the canals and works of navigation "owned, operated, or maintained by the United States" be prescribed by the Secretary of War, or the regulations referred to as adopted thereupon imposed the requirement or restraint of action or conduct which would be lawful but for the attempted legislation, there would be occasion for the inquiry whether the legislative will had been distinctly exercised and pronounced, in some general provision at least, either in this or some cognate enactment; and it would then become necessary to consider the distinctions as to delegation of power, for which the defendant contends, as pointed out in *Field* v. *Clark* (143 U. S., 649, 693, 12 Sup. Ct., 495), and the authorities there approved, namely, that "the legislature can not delegate its power to make the law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." (Locke's Appeal, 72 Pa. St., 491.) Here, however, the indictment alleges an offense committed by "knowingly and willfully drawing water" from a canal "then and there owned, operated, and maintained by the said United States," and thereby lowering the water surface below the crest of the dam, an interference with the property and proprietary rights of the Government. Presumptively, compensation has been rendered to all riparian owners, and all rights in and control of the waters of the canal are vested in the

United States, and no persons can have use, either of water or works, except under permission, and subject to any regulations which may be imposed. Without such permission the use would constitute a trespass. In this case Congress provides that permission may be granted through rules and regulations to be adopted by the executive department having charge of the works. It is true that Congress might prescribe the rules, either in general terms or in detail, but they are clearly of administrative rather than legislative nature, and may be relegated entirely to any executive agency, either with or without direct provisions by Congress. The discretion which is conferred, having regard to the use and care of the property of the United States, seems to appertain to the executive department and to be of the class defined in *United States* v. *Eliason* (16 Pet., 291, 301). The regulations so made constitute the only permission for using the water, and without permission there can be no claim of right to use, I presume, even without declaration by Congress to that effect, but section 7 of the act of September 19, 1890, as amended by the act of July 13, 1892, clearly prohibits any use "unless approved and authorized by the Secretary of War." I am of opinion that regulations for the purpose stated in the indictment may be established by the Secretary of War, and that they have the "force of law" within those purposes when adopted and promulgated as directed by the act. (*Gratiot* v. *United States*, 4 How., 80, 117.) Therefore the motion to quash the indictment will be overruled.

United States v. *Moody* (164 Fed. 269; Dist. Ct., W. Mich., Judge Knappen). Here an indictment was sustained for a violation of a regulation issued by the Secretary of War in pursuance of the act of August 18, 1894, chapter 299, which made it the duty of the Secretary of War "to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation that now are or hereafter may be owned, operated, or maintained by the United States as in his judgment the public necessity may require," and made violation of such rules a misdemeanor punishable by fine and imprisonment.

The specific charge was that the defendant disobeyed a lawful order of an assistant superintendent to tie up a steamer at a certain point outside the canal gates. The regulations in question provided that:

> The movement of all vessels, boats, or other floating things in the canal shall be under the direction of the superintendent and his assistants, whose orders and instructions must be obeyed.
>
> No person shall cause or permit any vessel or boat of which he is in charge, or on which he is employed, to in any way obstruct the canal, or delay in passing through it, unless he is permitted to do so by the superintendent or one of the assistant superintendents of the canal.

Van Lear v. *Eisle* (126 Fed. 823; Circ. Ct., E. Ark., Judge Trieber). This was a civil action based on a

rule made by the Secretary of the Interior under the provisions of the act of March 3, 1891, chapter 533, relating to the Arkansas Hot Springs Reservation, by which power is vested in the Secretary to "make all necessary rules and regulations as to said bathhouses, and the service therein, as shall be deemed best for the public interest." The Secretary issued regulations as follows:

> Rule 9. No bathhouse supplied with hot water from the Hot Springs Reservation shall permit any person to bathe therein who is under medical treatment, unless the applicant for baths presents satisfactory evidence that he or she is the patient of a physician duly registered at the office of the superintendent of the Hot Springs Reservation as one qualified to prescribe the waters from the hot springs.
>
> Rule 10. Physicians desiring to prescribe the waters of the hot springs, either internally or through the medium of the baths, must first be registered at the office of the superintendent of the reservation. Registration will only be accorded such physicians as are found, by a board of physicians designated by the Secretary of the Interior, to have proper professional qualifications and character.

The court, while holding that the complainant was not bound by these regulations, did so, not on the ground that Congress could not delegate the power to make such regulations, but for the reason that Congress had not so delegated power. The court expressly said that the doctrine "that Congress can delegate the power to make rules and regulations

concerning the public domain, or other matters, is now no longer an open question."

United States v. *Slater* (123 Fed., 115; Dist. Ct., Nev., Judge Hawley.) Here a criminal information was sustained for a violation by the defendant of a regulation issued by the Department of Agriculture in pursuance of the act of May 29, 1884, prohibiting interstate transportation of live stock affected with a contagious disease.

Stratton v. *Oceanic Steamship Company* (140 Fed., 829; C. C. A., 9th Circ., opinion by Judge Hawley.) The act of March 3, 1903, chapter 1012, imposes a head tax on alien passengers entering the United States to be paid by the master or owner of the vessel, but provides that the tax shall not be levied upon aliens in transit through the United States. It also authorizes the Commissioner General of Immigration, under the direction of the Secretary of the Treasury, to establish "such rules and regulations, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act and for protecting the United States and aliens migrating thereto from fraud and loss." The commissioner adopted a regulation to the effect that no alien desiring admission to the United States for the professed purpose of proceeding directly therefrom to foreign territory should be permitted to land except after the deposit with the collector of customs at the port, by the master or owner of the vessel, of the head tax of $2 for such alien, but that such amount should be

refunded upon proof satisfactory to the immigration officer that the alien had passed by direct and continuous journey through and out of the United States. The circuit court of appeals held this to be a valid regulation.

That there is nothing unusual in the broad terms of the act now in question conferring authority upon the Secretary of Agriculture to make regulations in respect to forest reservations may be seen by adverting to other instances in which Congress has conferred upon executive officers equally broad powers to be exercised in administering the laws relating to public lands. Among such laws are the following:

Act of June 3, 1878, chapter 150, 20 Statutes at Large, 88. This act authorizes citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes—

> subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes.

By section 3 it is provided that any person who shall violate its provisions—

> or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Act of June 3, 1878, chapter 151, 20 Statutes at Large, 89. This act provides for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory. By section 3 it is provided that—

> effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Act of March 3, 1891, chapter 561, as amended by the act of March 3, 1891, chapter 559, 26 Statutes at Large, 1093. This statute enacts that in certain States and Territories—

> * * * in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be pre-

> scribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

The act of October 1, 1890, chapter 1263, 26 Statutes at Large, 650. This is "An act to set apart certain tracts of land in the State of California as forest reservations." Section 2 provides as follows:

> That said reservation shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes, for terms not exceeding ten years, of small parcels of ground not exceeding five acres, at such places in said reservation as shall require the erection of buildings for the accommodation of visitors; all of the proceeds of said leases and other revenues that may be derived from any source connected with said reservation to be expended under his direction in the management of the same and the construction of roads and paths therein. He shall provide against the wanton destruction of the fish and game found within said reservation and against their capture or destruction for the purposes of merchandise or profit. He shall

> also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and, generally, shall be authorized to take all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act.

Act of February 28, 1899, chapter 221, 30 Statutes at Large, 908. This is "An act to authorize the Secretary of the Interior to rent or lease certain portions of forest reserve." By section 1 it is provided—

> That the Secretary of the Interior be, and hereby is, authorized, under such rules and regulations as he from time to time may make, to rent or lease to responsible persons or corporations applying therefor suitable spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. And he is further authorized to make such regulations, for the convenience of people visiting such springs, with reference to spaces and locations, for the erection of tents or temporary dwelling houses to be erected or constructed for the use of those visiting such springs for health or pleasure. And the Secretary of the Interior is authorized to prescribe the terms and duration and the compensation to be paid for the privileges granted under the provisions of this act.

Section 2478 of the Revised Statutes reads as follows:

> The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title (i. e., "The public lands") not otherwise specially provided for.

For the foregoing reasons it is insisted that the judgment of the court below should be reversed, and the case be remanded for trial.

J. A. FOWLER,
Assistant Attorney General.

LORING C. CHRISTIE,
Attorney.

O

Office Supreme Court U. S.
FILED
JAN 4 1911
JAMES H. McKENNEY,
Clerk.

Nos. 241 & 242.

In the Supreme Court of the United States

OCTOBER TERM, 1910

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
PIERRE GRIMAUD, AND J. P. CARAJOUS.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
ANTONIO INDA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DEFENDANTS IN ERROR

In the Supreme Court of the United States

OCTOBER TERM, 1910

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
PIERRE GRIMAUD, AND J. P. CABAJOUS. } No. 241

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
ANTONIO INDA } No. 242

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT.

This is a writ of error sued out by the United States to the District Court of the United States for the Southern District of California, to review a judgment sustaining a demurrer interposed by the defendants, to indictments charging them with grazing sheep, without permission, in the Sierra Forest Reserve.

The United States prosecutes this writ of error upon the assumption that the decision of the District Court was based upon an erroneous construction of the statute upon whch the indictments were founded, and therefore, by virtue of the Act of March 2, 1907, Chap 2564, 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1907, p. 209, the right obtained to review the decision by writ of error direct from this court.

The law under which the defendants were indicted is the Act of Congress, approved June 4, 1897, entitled "An Act making Appropriations for Sundry Civil Expenses of the Government for the year 1897, *and for other purposes.*" Act June 4, 1897, C. 2, Sec. 1, 30 Stat. 35, (U. S. Comp. St. 1901, p. 1540). In this act it is provided, among other things, that:

> "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations, which may have been set aside, or which may be hereafter set aside, under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such regulation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act *or such rules and regulatons* shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty three hundred and eighty-eight of the Revised Statutes of the United States."

Section 5388, Rev. St., as amended by Act of June 4, 1888, C. 340, 25 Stat. 166, (U. S. Comp. St. 1901, p. 3649), provides:

> "Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation or lands

> belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than $500 or be imprisoned not more than 12 months, or both, in the discretion of the court."

The jurisdiction of the Secretary of the Interior over forest reservations was subsequently transferred to the Secretary of Agriculture, and thereafter, on June 12, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit."

The demurrer to the indictment was interposed on the grounds that the Act of Congress of June 4, 1897, above mentioned, so far as it attaches a penalty to any of the rules and regulations thereafter to be made by the Secretary of the Interior, or his successor in authority, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive or administrative officer.

Points and Authorities

We hold the following propositions of law:

1. That the law under which the indictments were found is a void enactment under the Constitution of

the United States, for the reason that it does not sufficiently define, or define at all, what acts done or omitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States.

State vs. Mann, 2 *Oregon*, 238-241.
State vs. Smith, 30 *La. Ann.* 846.
U. S. vs. Eaton, 144 *U. S.* 677, 36 *L. Ed.* 591.
U. S. v. Grimaud, 170 *Federal* 206.
Cook vs. State, (*Ind.*) 59 *N. E.* 489.
U. S. v. Reese, 2 *Otto*, 214-256, 23 *L. Ed.* 563.
Sarlls v. United States, 152 *U. S.* 571, 38 *L. Ed.* 556.
Todd v. United States, 158 *U. S.* 278, 39 *L. Ed.* 982.
Augustine v. State, (*Tex.*) 52 *S. W.* 80.
State vs. Partlow, 91 *N. C.* 550
McGuire v. District of Columbia, 65 *L. R. A.* 430.
Tozer v. United States, 52 *Fed. Rep.* 917.
Louisville & Nash. R. R. Co. v. Commonwealth, (*Ky*) 33 *L. R. A.* 209.
Drake vs. Drake, 4 *Dev.* 110.
Com. vs. Bank, 3 *Watts & S.* 173
4 *Blackstone Comm.* 5.
12 *Cyc.* 129.
Ex parte McNulty, 77 *Cal.* 164.
15 *Penal Code. Cal.*
Peters vs. U. S. 36 *C. C. A.* 105.

2. That the law under which the indictments were found is in violation of the Constitution and laws of the United States, for the reason that it is not within the power of Congress under the Constitution of the United States to delegate to the Secretary of the Inter-

ior or the Secretary of Agriculture of the United States or any other person, authority or power to determine what acts shall be criminal, and the act in question is a delegation of legislative power to an executive officer to define and establish what shall constitute the essential elements of a crime against the United States.

U. S. vs. Mathews, 146 *Fed. Rep.* 306.
U. S. vs. Maid, 166 *Fed. Rep.* 650.
U. S. vs. Blasingame, 166 *Fed. Rep.* 654.
U. S. vs. Eaton, 144 *U. S.* 677, 36 *L. Ed.* 594.
U. S. vs. Keokuk, & H. Bridge Co. 45 *Fed. Rep.* 178.
U. S. vs. Rider, 50 *Fed. Rep.* 106.
O'Neil v. American Fire Ins. Co. 166 *Pa.* 72, 30 *Atl.* 943.
State, ex rel. Adams v. Burdge, 95 *Wis.* 390, 37 *L. R. A.* 157.
Dowling vs. Lancashire Ins. Co. 92 *Wis.* 63, 65 *N. W.* 741.
Anderson v. Manchester Fire Ins. Co. 59 *Minn.* 182, 28 *L. R. A.* 609.
Ex parte Cox, 63 *Cal.* 21.
Harbor Com'r vs. Excelsior Redwood Co. 88 *Cal.* 491.
Schaezlein vs. Cabaniss, 135 *Cal.* 466.
Kilbourn vs. Thompson, 103 *U. S.* 168-191, 26 *L. Ed.* 378.
U. S. v. Wiltberger, 5 *Wheat.* 85, 5 *L. Ed.* 92.

ARGUMENT.

1.

That the law under which the indictment were found is a void enactment under the Constitution of the United States, for the reason that it does not sufficiently define, or define at all, what acts done or obmitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States.

It will be observed that this statute under which the indictments in these cases were found confers plenary power upon an administrative officer to make any rule or regulation he shall deem fit to preserve the forest reserves of the United States, and attaches a heavy penal sanction to the violation of any of those rules or regulations, whatever their nature, and however innocent or innocuous the act itself might otherwise be. It is contended by the Government that this law is complete in itself, that it violates no constitutional limitation or legal principle known to the jurisprudence of the United States, and that it complies with the established rule "that crimes and offenses cognizable under the authority of the United States, are such, and only such, as are expressly designated by law."

While the general principle of statutory construction whereby it is announced that in examining an act of Congress every intendment will be made by the court in favor of its constitutionality is undisputed, nevertheless, as this law is penal in its nature it must be subjected to the strict rules of construction applied to all penal statutes. In 12 Cyc 129, the definition of a crime is as follows:

> "A crime is an act or omission which is prohibited by law as injurious to the public and punished by the state in a proceeding in its own name or in the name of the people or the sovereign."

Blackstone defines a crime in the following language:

> "A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it."

4 *Bl. Comm.* 5.

..The Penal Code of California defines a crime as follows:

> "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it and to which is annexed upon conviction either of the following punishments; death, imprisonment, fine, removal from office or disqualification to hold office."

15 *Penal Code. Cal.*

It will be observed that in each of the above definitions the thing committed or omitted is an *act.* The first and last definitions are divisible into two elements, the act commanded or forbidden and the punishment, and it has been held that the fixing of a punishment is as necessary to constitute a crime as the definitions of the act.

> *U. S. v. Eaton,* 144 *U. S.* 677, 36 *L. Ed.* 591.
> *People vs. McNulty,* 93 *Cal.* 427.

In the case of Ex parte McNulty, infra, the court, in holding that the legislature cannot delegate to a board of medical examiners the power of declaring what acts shall constitute a misdemeanor, said that,

> "Practicing after an order of the board revoking the certificate for unprofessional conduct is not declared to be a crime, and no penalty is attached to it. Respondent's position really is, that the legislature must have intended such conduct to be a criminal offense. It would be vain to inquire what intent lurked in the minds of the persons who happened to be members of the legislature when the act was passed. It certainly would be a forced thing to imagine their intent to be that a man should loose his

> liberty for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting a board of examiners. At all events, the question whether or not the conduct in question is made a crime must be determined from the language used in the statute, and we find there nothing that declares such conduct to be a criminal offense. Nor is there anything in what is left of the act of 1876 (although no reference is made to that act in the complaint), which makes the conduct ascribed to petitioner a crime. Constructive crimes—*crimes built up by courts with the aid of inference, implication and strained interpretation*— are repugnant to the spirit and letter of English and American criminal law."
>
> *Ex parte McNulty*, 77 *Cal.* 164.

In the case of State v. Mann, 2 Oregon, 238, 241, the court held as follows:

> "It is a well settled rule of law that no one can be punished for doing an act unless it clearly appears that the act sought to be punished comes clearly within both the letter and spirit of the law prohibiting it. *The act constituting the offense should be clearly and specially described in the statute and with sufficient certainty, at least, to enable the court to determine, from the words used in the statute, whether the act charged comes within the prohibition of the law.*"

Keeping in mind the definition above set forth requiring that in order to constitute a crime an act well defined by the statute must either be committed or omitted, and also observing the rule so clearly laid down in the last case above cited, it may be profitable to revert for a moment to the act of Congress involved

herein. It certainly cannot be said that any specific act is either commanded or forbidden by any language used in this statute. The only thing that is forbidden is a violation of such rules and regulations as may be prescribed by the Secretary of the Interior. But the acts which are to be commanded or forbidden by these rules are not specially described nor are they indeed referred to except in the most general terms. When the statute became a law by the signature of the President there were no rules prescribed and it would have been impossible for a citizen, by any possible analysis of the act, to have determined what were the acts forbidden or commanded and what was the legislative intent which should govern his conduct. Nothing illustrates this better than the line of argument adopted by the late Solicitor-General on page 30 of his brief, where he says: "The regulations do no more than make specific application of the controlling principles fixed by Congress. *They express particulars which the general declaration of the legislature comprehends.* And further on page 38, where he says that "The rule of criminal liability is fixed by Congress; and its *essential factors are* defined by the *legislature.*"

It cannot possibly be said that the forbidding of grazing or the requiring of a permit before grazing, is one of the "essential factors defined by the legislature" in this act of Congress. The very fact that counsel is obliged to resort to this ingenious argument in order to determine what act ,if any, was forbidden or commanded by Congress, in itself condemns the act as being unconstitutional for the reason that it lacks a sufficient definition of a crime.

State v. Mann, 2 *Oregon*, 238, 241.

In the year 1855 the following act was passed by the legislature of the State of Louisiana, by which it was enacted:

> "That whoever shall commit the crime of incest shall, on conviction thereof, suffer imprisonment at hard labor for life."

The first prosecution for incest, under this statute, that found its way to the Supreme Court of Louisiana was in the year 1878.

State vs. Henry Smith, 30 *La., Ann.* 846.

It was there held that the crime of incest, although denounced, *was not defined by any statute of the state,* and, hence, the conviction of the accused man could not stand. Chief Justice Manning, in concluding the opinion of the court, said:

> "We are compelled to discharge the prisoner, and, in doing so, call the attention of the legislative department of the government to the defect in the statute, to the end that it may be speedily remedied. It should declare that inter-marriage or cohabitation between persons within the degrees of consanguinity within which marriage is unlawful constitutes the crime of incest, or such words as are used elsewhere in other criminal statutes, and which have always been held to be necessary for the proper definition and punishment of crimes, which, like this, *vary in meaning* according to the temper or religious notions of different countries."

State vs. Smith, 30 *La. Ann.* 846.
Cook vs. State (*Ind.*) 59 *N. E.* 489.
Augustine v. State. (*Tex*) 52 *S. W.* 80.
State vs. Partlow, 91 *N. C.* 550.
Comm. v. Bank, 3 *Watts & S.* 173.
Drake vs. Drake, 4 *Dev.* 110.

The offense with which the defendant's were charged is that of grazing sheep upon a forest reservation without a permit. Is this crime explicitly defined in the Act of Congress in question? The section of the statute which the Government contends explicitly describes this crime, simply states that the Secretary of the Interior shall make provisions for the protection agaisnt destruction by fire and depredations upon the public forests and forest reservations * * * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, * * * * * and that any violation of the provisions of this act or such rules and regulations shall be punished, etc. If the position of the Government in this case be sound then we have the legal anomaly of a law under which indictment can be found for a *thousand* different offenses, no one of which is specified in the statute; for each offense a radically different indictment would have to be found, every one of which would describe a different offense, in different language, and yet each offense must be tried and punished under one and the same section of the statute. We had yet to hear of a criminal statute under which an alleged offender could be convicted and punished for an unlimited number of different offenses, each offense being necessarily described in each indictment in language which would preclude his conviction for any of the different offenses for which he might be indicted under the same section of the statute, no one of the specific acts for which the defendant would be tried and convicted being described and denounced as a crime and where in the statute, the indictment in each case describing totally different acts or omissions, until we

found the statute involved in this case buried in an Act making appropriations for sundry civil expenses of the government.

The language of the late Mr. Justice Brewer, in the case of Tozer vs. United States, is very apposite to the case at bar, in which he said:

> " But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. v. Dey 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:
>
> " 'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, *for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.* In Dwar. St. 652 it is laid down "that it is impossible to dissent from the doctrine of Lord Coke, that the acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' See, also, U. S. v. Sharp, Pet. C. C. 122; The Enterprise, 1 Paine, 34; Bish. St.

Crimes, sec. 41, Lieb.Herm.156. In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in Ex parte Jackson, 45 Ark. 158."

Tozer v. United States, 52 *Fed. Rep.* 917.
Louisville & Nash. R. R. Co., v. Commonwealth, (*Ky.*) 33 *L. R. A.* 209.

On July 1, 1908, the Secretary of Agriculture promulgated eighty-one rules and regulations, the violation of any one of which is made a crime by this statute. Some of these forest reservation are thousands of miles away from the place whence it is supposed these rules and regulations will emanate. How can any citizen know, from day to day, whether he is a criminal or not? To-day he may be on a forest reserve engaged in doing something that is not a violation of these rules. To-morrow the secretary may change the rules and regulations and forbid the very acts which this man has hitherto done with impunity. This man is then a criminal and liable to severe punishment without any further notice. Counsel for the Government intimate that the *law* can readily be ascertained by referring to these rules and regulations. True, but then the citizen is looking not to an act of Congress defining and punishing as a crime certain acts of omission or commission, but to a law enunciated by an administrative officer.

But before a citizen could possibly obtain the new rule of law—he not making daily visits to the Department of Agriculture—to which he must conform his actions, he might innocently and without any intention of wrong doing, or possibility of knowing he was a wrong-doer, have committed offenses which would result in his being imprisoned fifty years and fined twenty-five thousand dollars; nor is it beyond the bounds of probability that such an offender would be prosecuted by a zealous United States Attorney, and such a punishment inflicted (see O'Neil v. Vermont, 144 U. S. 323), and under the holding of this court in that case he could not urge that such a punishment is cruel and unusual.

Can a limit be set to the enactment of rules and regulations which are, in the language of the Solicitor-General, "fairly and importantly pertinent to the declared congressional objects of protecting and improving the forests?" If not, then there is no limit to the number of different and distinct crimes for which a citizen can be indicted and convicted under this statute, none of which is explicitly described in the statute, and each offense composed of essentially different elements. It is axiomatic that offenses created by statute must be accurately and clearly described in the indictment. Should the court hold that it is sufficient in an indictment under this law to describe the offense in the words of the statute, which is the general rule, would the accused be informed of the nature and cause of the accusation against him? Could a convicted offender, in another prosecution, plead former jeopardy under such an indictment? If the indictment under which he was convicted were framed in the words of the statute, a

conviction for grazing sheep upon a forest reservation without a permit could be successfuly pleaded in bar of a prosecution under the same act for cutting timber on a forest reserve in violation of the all-pervading rules. Here are certainly two separate and different offenses which it is proposed to punish under this act, neither of which are specifically defined in it. We need not stop at two. There can be numberless wholly different offenses against this statute, without any information as to what they consist of, under the construction sought to be placed upon it by the Government.

Should the court hold that the other rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, that every ingredient of the offense must be accurately and clearly expressed, is applicable to prosecutions under this statute, then it is conclusive that this statute embraces not one but thousands of possible crimes, not defined or described with precision, or at all, in the statute, but which are attempted to be described and defined, not in any statute of the United States, but in the rules and regulations promulgated by an administrative officer of the Government.

We contend that this statute is obnoxious to the rule laid down by Chief Justice Marshall in the case of United States vs. Wiltberger, 5 Wheat. 85, and no stronger argument can be made against the validity of this statute to sustain the prosecution in the case at bar, than the following extract from the opinion of the illustrious father of Federal Jurisprudence in that case:

> "The indictment in this case, is founded on the 12th section of the act, entitled, "an act for the punishment of certain crimes against the

United States." That section is in these words: 'And be it enacted, that if any seaman or other person, shall commit manslaughter on the high seas, or confederate,' &c., ' such person or persons so offending, and being therefore convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

"The jurisdiction of the court depends on the place in which the act was committed. Manslaughter is not punishable in the courts of the United States, according to the words which have been cited, unless it be committed on the high seas. Is the place described in the special verdict a part of the high seas?

"If the words be taken according to the common understanding of mankind—if they be taken in their popular and received sense—the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country. This extended construction of the words, it has been insisted, is still farther opposed by a comparison of the 12th with the 8th section of the act. In the 8th section Congress has shown its attention to the distinction between the "high seas" and a "river haven, basin, or bay." The well known rule that this is a penal statute, and is to be construed strictly, is also urged upon us.

"On the part of the United States, the jurisdiction of the court is sustained, not so much on the extension of the words "high seas" as on that construction of the whole act which would engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. This

transfer of the words of one section to the other is, it has been contended, in pursuance of the obvious intent of the legislature; and in support of the authority of the court so to do, certain maxims, or rules for the construction of statutes, have been quoted and relied on. It has been said, that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered as if within the letter of the statutes. So if it be within the reason of the statute.

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

"It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for

> construction. The case must be a strong one indeed, which would justify the court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as *to punish a crime not enumerated in the statute*, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."
>
> *U. S. v. Wiltberger*, 5 *Wheat.* 85, 5 *L. Ed.* 92.

An indictment framed in the general words of this statute would be obnoxious to a demurrer. In order to constitute due process of law under the 6th amendment to the Constitution an indictment must state the nature and cause of the accusation against the accused, thus necessitating that all the essential ingredients of the offense charged comprised within the definition of the crime given by the statute be set forth. These facts and circumstances must be stated with clearness and certainty, otherwise the accused will not be apprised of the particular crime with which he stands charged, and would be unable to prepare his defense and avail himself of his acquittal or conviction against further prosecution for the same cause.

The statute in question does not denounce a punishment against any person who shall destroy or commit

depredations upon a forest reserve. Those acts are not crimes against the United States under the section of the statute on which these prosecutions are based. An indictment charging a citizen with committing depredations upon a forest reserve, and also pleading the specific acts of which the alleged depredations consisted, would not state facts sufficient to constitute a crime against the United States under this particular section; but if in addition thereto it were pleaded in such an indictment that the acts constituting the depredations charged were done contrary to the rules and regulations of the Secretary of Agriculture duly made and promulgated pursuant to this statute, then, if the government's contention in this case is correct, the indictment would not be obnoxious to a demurrer, since the statute only penalizes a violation of the rules and regulations to be thereafter promulgated by the Secretary. It is thus patent that it is not a law passed by the Congress of the United States that the defendants in these cases are charged with violating, but a law enacted solely by an administrative officer of the Government.

It would not be enough to charge in general terms that the defendant had violated the rules and regulations of the Secretary of Agriculture, without descending to particulars and giving a description of the acts constituting the offense, as the defendant would be utterly at loss to know which rule or regulation he is charged with violating, and he could not possibly come to court prepared to meet a charge of violating any one of the regulations promulgated that the prosecutor might choose to try him on. Does not this fact conclusively establish that the statute in question is void

for uncertainty, since under its operation and the requirements of due process of law laid down by the Constitution, every violation of each rule constitutes a different and distinct crime? Congress itself would be powerless to authorize a conviction of an offender under an indictment framed in the general terms used in this statute, as such a loose form of accusation would allow of the trial of a multitude of offenses under an inaccurate description of one. If due process of law as guaranteed by the 6th amendment demands in an indictment a specific description of the offense charged, much more so does it demand that the statute under which the indictment is found should clearly state the specific acts or omissions that shall constitute a crime against the United States.

In the case of Sarlls vs. United States, 152 U. S. 570, this court held that lager beer was not within the meaning of a statute prohibiting the introduction into the Indian country of "Spirituous liquors," even though beer is a fermented liquor, contains alcohol, is intoxicating, and was within the supposed mischief intended to be corrected by the statutes; that such a statute being penal, could not be construed so broadly as to include beer within its terms; and the judgment of conviction in the lower court was reversed and the defendant discharged. In commenting upon the case of State vs. Giersch, and other cases supporting the contrary lines of authorities, the reasoning and conclusion wherein had been adopted by the United States District Court of Arkansas in sustaining the conviction and sentence, below, Mr. Justice Shiras said:

> "To the contrary of these definitions and decisions, the principal case is that of State vs.

Giersch, 98 N. C. 720, the reasoning and conclusion wherein were adopted by the court below. That was a case where a statute of North Carolina prohibited the introduction and sale of spirituous liquors, and the court held those terms to be generic, and to include all intoxicating liquors containing alcohol, whether distilled, fermented, or vinous.

"The reasoning on which such a conclusion is reached excludes the common and popular signification of the words, and finds the meaning of the statute in the fact, true in a scientific sense, that alcohol is found in fermented, as well as distilled liquors, and that the purpose of the statute is to prevent the mischief occasioned by the use of intoxicating drinks.

"We cannot agree with this method of reading a penal statute. The purpose of such a statute is to notify the public of the legislative intent, not to furnish scientific definitions. That intent is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech.

"Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, *because of a supposed public policy or purpose.*"

Sarlls vs. United States, 152 *U. S.* 570.
Todd vs. United States, 158 *U. S.* 278.

In the case of the United States vs. Reese, 2 Otto, 241, this court held that a penal statute must be construed strictly. That this court cannot introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It

seems to us that the opinion of Mr. Justice Waite in that case, from which we quote largely below, should effectually dispose of the Government's contention in this case, that the statute under consideration here can be so construed, not only by the court, but by the Secretary of Agriculture, as to make a crime of any act which he shall deem a destruction of, or depredation on, a Forest Reserve. It is the very essence of the Government's contention here that the very general language used in the statute under consideration can be, by construction of the Secretary and the court, made to include any number of widely different specific offenses. The answer to this is found in the following quotation from the opinion of Mr. Justice Waite in the case of the United States vs. Reese, supra, as follows:

> " A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense and thinks it is confined to a

wrongful discrimination on account of race, etc., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. *Every man should be able to know with certainty when he is committing a crime.*" * * * * * * *

"We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but* by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. *The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when as expressed, it is general only.*"

"*It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the court*

to step inside and say who could be rightfully detained and who should be set at large.. This would, to some extent, substitute the Judicial for the Legislative Department, of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people."

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

"We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offense charged in the indictment; and that the circuit court properly sustained the demurrers and gave judgment for the defendants."

U. S. vs. Reese, 2 *Otto*, 214-256, 23 *L. Ed.* 563.

IN RE KOLLOCK AND THE UNION BRIDGE CASE

In view of the prominence given by the Solicitor-General to the decisions of this court in the cases of In Re Kollock, 165 U. S., 526, Union Bridge Co. vs. United States, and Buttfield vs. Stranahan, 192 United States, 470, 492, we felt it incumbent upon us to distinguish those cases from the case at bar. A careful examination of them will show that they differ radically from this; not only as to the statutory provisions

construed but also in the line of reasoning used by the court. In United States vs. Hudson, 7 Cranch, 32, this court has said: "The legislative authority of the Union must first make *an act* a crime, affix the punishment to it, and declare the court that shall have jurisdiction of the offense." In order for an act of Congress to comply with the above rule laid down by this court, the Act itself must specifically define what act or acts the commission or omission of which will constitute a crime against the Government. This rule was complied with in the Oleomargarine Act construed in the Kollock case, and in the River and Harbor Act, on which the prosecution of the Union Bridge Co. case was based.

In the Kollock case the defendant was indicted under section 6 of the act of Congress, approved August 2, 1886, (24 St. at L. 209, Chap. 840) entitled "An Act Defining Butter, and also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation and Exportation of Oleomargarine." Section 6, of that act, among other things, provided:

> "Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceding 10 pounds and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. *Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to*

> law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than $1,000 and be imprisoned not more than two years."

It will thus be seen that the statute under which Kollock was indicted and convicted, and the conviction sustained by this court, definitely prescribed the act or acts which should constitute the offense. The most careful examination will fail to reveal any such certain definition of the acts which shall constitute the offense for which the defendants in the cases at bar are prosecuted, in the act of Congress conferring upon the Secretary of the Interior the right to prescribe a rule or regulation, for the infraction of which fine and imprisonment are denounced upon the offender. It was urged by Kollock that the statute above quoted was invalid because it did not "define what act done or omitted to be done shall constitute a criminal offense," "and delegates the power" to determine what acts shall be criminal, "by leaving the stamps, marks and brands to be determined by the Commissioner." In overruling this contention and upholding the statute, Mr. Justice Fuller, delivering the opinion of the court, said:

> "We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. *But here the law requires the packages to be marked and branded; prohibited the sale of packages that were not;* and prescribed the punishment for sales in violation of its provisions; while the regulations simply describe the particular marks, stamps,

and brands to be used. *The criminal offense is fully and completely defined by the act* and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense. We think the act not open to the objection urged, and that it is disposed of by previous decisions."

"* * * * We concur with the court of appeals that this provision does not differ in prinicple from those of the internal revenue laws, which direct the Commissioner of Internal Revenue to prepare suitable stamps to be used on packages of cigars, tobacco, and spirits; to change such stamps when deemed expedient; and to devise and regulate the means for affixing them. Rev. Stat ++ 3312, 3395, 3445, 3446, etc.

"* * * And we are of opinion that leaving the matter of designating the marks, brands, and stamps to the Commissioner, with the approval of the Secretary, involved no unconstitutional delegation of power."

After a close scrutiny of the statute under which Kollock was indicted, and the opinion of Mr. Chief Justice Fuller in that case, we feel justified in saying that instead of the Kollock case being a decision upholding the Government's contention in the cases at bar, it is directly the contrary, and sustains rather the position taken by the defendants in error herein.

The case of Union Bridge Co. vs. United States, 204 U. S. 364, was a prosecution based on Section 18 of the

River and Harbor Act of March 3, 1899, which provides:

> "That when the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width or span, or otherwise, or where there is difficulty in passing the draw opening or draw span of such bridge by rafts, steamboats or other water crafts, it shall be the duty of said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed * * * * * * * * if the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War, in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars: * * *"

This statute, it will be seen, fully defines the acts that shall constitute the crime, and affixes the punishment, and is, therefore complete in itself. Any person, corporation or association can know from a perusal of the statute what acts will constitute a crime against the United States. But the statute allows a locus pot-

ential by providing that when the Secretary of War has ascertained the fact he shall notify the offender, and however guilty the offender may be, he can still retreat and escape the consequences of his unlawful act by complying with the Secretary's order. Furthermore, the statute does, in substance and effect, though not in terms, make the finding of the Secretary of War that the bridge is an unreasonable obstruction to free navigation conclusive evidence of that fact. But even in establishing a special rule of evidence in that class of cases, the Act does not proceed arbitrarily and give to the Secretary of War full power and discretion to declare *any bridge* an obstruction to free navigation; he must proceed upon notice and evidence, and his order only becomes a conclusive rule of evidence after due notice and hearing has been given to the offender. The statute specifically says that "*if any railroad or other bridge * * * * * * is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width or span or otherwise, or where there is difficulty in passing the draw opening or draw span of such bridge by rafts, steamboats or other water craft, * * * * *"* its continued maintenance, or failure to comply with the *lawful order* of the Secretary of War, after due notice has been given and a hearing had, shall constitute an offense and be punished accordingly. This falls far short of a grant of power to an administrative officer to make such rules and regulations as he shall deem necessary, which shall have the force and effect of law, and become, *ipso facto*, criminal laws, immediately upon their promulgation. On the contrary, the administrative officer is to *ascertain a fact* which when ascertained shall be effected by

the law. This is clearly the ground upon which the decision is based, and is said to be in harmony with the former decisions of this court. Further, in the opinion of Mr. Justice Harlan, this court also bases its decision in that case partly upon the ground that the Secretary of War could not act thereunder without first giving notice to the parties offending and an opportunity to be heard; that the notice was duly given to all parties concerned, and they were fully heard; and that the Secretary of War was entirely "justified, if not compelled by the evidence, in finding that the bridge in question was an unreasonable obstruction to commerce."

The case of Buttfield vs. Stranahan, 192 U. S. 470, 492, is sufficiently distinguished from the cases at bar by the simple statement that it was not a criminal proceeding, but an action to recover damages for the alleged wrongful seizure, removal and destruction of certain tea that had been seized by the collector of the port of New York, pursuant to the Act of Congress of March 2, 1897, entitled "An Act to Prevent the Importation of Impure and Unwholesome Tea, etc." (29 Stat. at L. 604, Chap. 538, U. S. Comp. Stat. 1901, p. 3194), which is an act authorizing the seizure and destruction of the property of tea importers who should, in violation of its provisions, import or bring into the United States any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of the Act, and importation of all such teas is prohibited; and by the following excerpt from the opinion of this court delivered by Mr. Justice White in that case:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the court of appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of Marshall Field & Co. vs. Clark, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495, where it was decided that the 3rd section of the tariff act of October 1, 1890 (26 Stat. at L. 567, chap. 1244), was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it auauthorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in Marshall Field & Co. vs. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate

foreign commerce could not be efficaciously exerted."

Buttfield vs. Stranahan, 192 *U. S.* 470, 492.

Caha vs. United States, 152 U. S. 211, also relied upon by the Solicitor-General, was a prosecution for perjury under Section 5392, U. S. Rev. Stat., and the following quotations from the opinion of Mr. Justice Brewer, show that it is not an authority supporting the contention of the Government in this case, this court saying:

"This is not a case in which *the violation of a mere regulation of a department is adjudged a crime.*" * * * * * *

"This perjury was not merely a wrong against that tribunal or a violation of its rules and requirement; the tribunal and the contest only furnished the opportunity and the occasion for the crime, *which was a crime defined in and denounced by the statute.*" and further, after quoting from the case of United States vs. Eaton, Supra, the learned justice continues:

"This, it will be observed, is very different from the case at bar, *where no violation is charged of any regulation made by the department.* All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, *at which the defendant committed perjury in violation* of Section 5392."

Caha vs. U. S. 152 *U. S.* 211.

We feel constrained to take issue with the late Solicitor-General on the statement made on page 36 of his able brief, wherein he states that "In the Bailey case a

conviction of perjury was sustained when the false oath was taken before an officer whom a treasury regulation alone authorized to administer the oath." This statement refers to the case of United States vs. Bailey, 9 Peters, 239, which is one of the four cases relied upon by the Government to sustain its position (the other three being the Kollock case, Union Bridge case and U. S. vs. Caha, already discussed) that the rule promulgated by the Secretary of Agriculture forbidding the grazing of sheep on a Forest Reserve is one of the thousands of valid administrative orders to which a criminal sanction can be attached by the Act of Congress of June 4, 1897. The Bailey case was not a conviction of perjury. It was a conviction for false swearing to a claim against the United States under the Act of Congress of March 1, 1823, but the punishment denounced by that statute against false swearing is the same as for wilful and corrupt perjury. The defendant Bailey in that case was not convicted of perjury, but of the new and substantive offense of false swearing, created by the statute. He had taken an oath before a justice of the peace of the State of Kentucky, an officer authorized to administer oaths, that a certain claim against the United States was true, when in fact it was false. That claim, attested by the oath of the claimant, was presented to the Secretary of the Treasury, who was authorized to pass upon the validity of such claims, who had made a rule or acted upon a custom or usage (from the report of the case it is uncertain which), of considering, and allowing or disallowing such claims when they were supported by an oath taken before any officer competent to administer an ordinary oath by virtue of his office. It was contended by the defendant in the

Bailey case that as Congress had not authorized any State officer to administer oaths to claimants under the Act of Congress of July 5, 1832,—the act under which the claim was being made,—therefore, in analogy to the crime of perjury, there could be no crime of false swearing, even though the justice who administered the oath, was, by virtue of his official character, competent to administer an oath. This contention found no favor with the court, they holding, speaking through Mr. Justice Story, that having taken an oath before an officer having an admitted authority under the State laws to administer an oath, *virtute officii*, and having presented to the Secretary and had considered his claim supported by such false oath, that it was clearly within the provisions of the Act of March 1, 1823, defining false swearing, and affixing to it the punishment denounced against perjury. We quote below from Mr. Justice Story's opinion, showing the true ground on which the conviction was sustained, and that the question there involved and decided was not the case of a statute conferring power upon an administrative officer to make such rules and regulations as he might deem fit and proper, and punishing as a crime any violations of the rules and regulations that might so be promulgated, without in any manner defining in the statute itself the act or acts to which the penal sanction is attached. In the Bailey case the statute fully defined the crime as well as affixed the punishment, and it was held not to be analogous to the crime of perjury, and that the crime of false swearing under that statute could be committed by taking a false oath before a State officer competent to administer an ordinary oath

by virtue of his office, as is shown by the following quotation from the opinion of the court:

> "Admitting, for the sake of argument, that it is true (on which, however, we express no opinion) that a State magistrate is not compellable to administer an oath, *virtute officii*, under a law of the United States which expressly confers power on him for that purpose, still, if he should choose to administer an oath under such a law, there can be no doubt that it would be a lawful oath by one having competent authority, and as much so as if he had been specially appointed a commissioner under a law of the United States for that purpose. And we think that such an oath administered under such circumstances, would clearly be within the provision of the Act of 1823. That act does not create or punish the crime of perjury, technically considered. But it creates a new and substantive offense of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the State magistrate, under the laws, had judicial jurisdiction, so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate, and was not in violation of his official duty."

> "There being no express authority given by any law of the United States to any State magistrate to administer an oath in the present case, the next inquiry naturally presented is, whether the Secretary of the Treasury had an implied power to require, authorize, allow or admit any affidavits sworn before State magistrates, in proof or in support of any claim under the Act of 1832; for if he had, it would be very difficult

to show that such an affidavit is not within the true intent and meaning of the Act of 1823, as it certainly is within the very words of the enactment. The policy of the act clearly extends to such a case; and the public mischief to be remedied is precisely the same as if the affidavit had been taken under the express and direct authority of a statute of the United States."

United States vs. Bailey, 9 *Peters*, 239.

In the able and exhaustive opinion of Judge Welborn the law applicable to this case was fully discussed, and we cannot close this subdivision of our brief any better than with the following quotation from his opinion on this branch of the case:

"There can be no pretense that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep, without permission, in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the Government's own theory, it did not become a crime until nine years after the passage of the statute, which the government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and, after much reflection, I have now no hesitancy in holding that the statute, in so far as it affixes punishment to infractions of executive rules and regulations thereafter to be promulgated, is incomplete and wholly inadequate to form the basis of a criminal prosecution."

United States vs. Grimaud, 170 *Fed Rep.* 207.

II.

That the law under which the indictments were found is in violation of the Constitution and laws of the United States, for the reason that it is not within the power of Congress under the Constitution of the United States to delegate to the Secretary of the Interior or the Secretary of Agriculture of the United States, or any other person, authority or power to determine what acts shall be criminal, and the act in question is a delegation of legislative power to an executive officer to define and establish what shall be the essential elements of a crime against the United States.

U. S. vs. Mathews, 146 *Fed. Rep.* 306.
U. S. vs. Maid, 116 *Fed Rep.* 650.
U. S. vs. Blasingame, 116 *Fed Rep.* 654.
U. S. vs. Eaton, 144 *U. S.* 677, 36 *L. Ed.* 594.
U. S. vs. Keokuk, & H. Bridge Co. 45 *Fed. Rep.* 178.
U. S. vs. Rider, 50 *Fed. Rep.* 106.
O'Niel vs. American Fire Ins. Co. 166 *Pa.* 72, 30 *Atl.* 943.
State, ex rel. Adams vs. Burdge, 95 *Wis.* 390, 37 *L. R. A.* 157.
Dowling vs. Lancashire Ins. Co. 92 *Wis.* 63, 65 *N. W.* 741.
Anderson vs. Manchester Fire Ins. Co. 59 *Minn.* 182, 28 *L. R. A.* 609.
Ex parte Cox, 63 *Cal* 21.
Harbor Com'r. vs. Excelsior Redwood Co. 88 *Cal.* 491.
Schaezlein vs. Cabaniss, 135 *Cal.* 466.
Kilbourn vs. Thompson, 103 *U. S.* 168-191, 26 *L. Ed.* 378.

Our second contention, briefly summarized, is that the Act of Congress of June 4, 1897, is a delegation of legislative power to an administrative officer in that it leaves to his discretion the defining of acts that shall constitute a crime against the United States, and grants to him power and authority to make, alter and repeal a portion of the criminal laws of the United States at his pleasure, without the advice, knowledge or consideration of Congress, since under the Government's theory of the case the rules and regulations when promulgated by the Secretary have the force and effect of criminal laws. We do not dispute the proposition that an act of Congress complete in all its parts, can be called into operation, or its operation suspended by the happening of a contingent event, the fact of the happening of such contingent event to be ascertained by an executive officer, and when such fact is ascertained, such law can be suspended, or brought into operation, by the act of the executive officer proclaiming that event. This is a mere ministerial duty, granting no power to legislate, and leaving nothing to the discretion of the executive or administrative officer beyond the ascertaining of the fact or contingency upon the happening of which the suspension or operation of the law is made by its own terms to depend. This principle was enunciated and acted upon by this court in construing the Act of Congress of October 1, 1890, in the case of Field vs. Clark, 143 U. S. 694. That principle, however does not touch this case.

The statute in question in this case contains none of the essential constituent elements of a criminal law. Its language is that any violation of the rules and regulations of the Secretary shall be punished as a crime.

This language, in a criminal statute, which must particularly define the act or acts which it attempts to denounce, and attach to them a penal sanction, is pointless. It does not attempt to define the act or acts which shall constitute a crime, and does not in terms prohibit any specific act, but leaves to the discretion of the Secretary of Agriculture to define the essential elements of a criminal statute the violation of which shall be an offense against the United States. It is true that it does attempt to make the violation of any future law, which may thereafter be decreed by the wisdom of the Secretary, a crime and punish it as such. What is a law? Is it not, in the language of Blackstone, a rule prescribed by the legislature, uniform, universal and permanent in its operation; not a transient, sudden order from an administrative officer to or concerning a particular person or thing. Under this statute, as construed by counsel for the government, the Secretary's orders have the force and effect of administrative decrees, as insidious in their origin, and as pernicious in their effects, as the rescripts of a Roman Emperor, who, under the despotism of the civil law, combined in his own person the legislative, executive and judicial powers of the Roman world.

The validity of this act of June 4, 1897, has come up before the Federal Courts in several cases. It was before the District Court for the Southern District of California in the case of U. S. vs. Blasingame, 116 Fed. Rep. 654, wherein Judge Wellborn held that the act "in so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the Secretary of the Interior for the protection of the forest reservation, is, in substance and effect, a delegation of legisla-

tive power to an administrative officer." It was again construed in Dastervignes vs. U. S., 122 Fed. Rep. 30, wherein the Circuit Court of Appeals, Ninth Circuit, in a suit praying for an injunction to restrain trespassing, held that the right to make rules to regulate the occupancy and use of forest reservations "And to proserve the forests thereon from destruction, "did not involve the delegation of legislative power as applied to the property of the government, but, on the contrary, the making of such rules was a proper exercise of administrative authority. Its validity was once more construed in U. S. vs. Mathews 146 Fed. Rep. 306, wherein the regulation, as defining a crime, was held by District Judge Whitson to be an unlawful delegation of legislative power.

The legislative power of the United States is vested alone in Congress, and that power cannot be delegated by that body to an officer of any other branch of the government. This is a principle so well established that citation of authority is unnecessary. The only question to be considered in any particular case is whether or not the particular power delegated is legislative.

It will be observed from the above cases that there have been opposite constructions of this statute, the one upholding it as a proper delegation of legislative powers. If these two lines of cases can both be upheld in principle then we have a delegation of power which is valid for certain purposes, but invalid for others. That is, the power to make rules and regulations may be valid when exercised in the civil administration of law, and at the same time invalid as the definition of

crime. An examination of the cases will show that these two constructions are not inconsistent, but they are upheld by both precedent and principle. In the case of Stratton vs. Oceanic S. S. Co., 140 Fed. Rep. 829, 830, the same court which decided Dastervignes vs. U. S., supra, said:

"The law is well settled that the legislative power of the United States is vested in Congress, and that Congress has no authority to delegate that power to any administrative officer, but Congress has the power to authorize any of its administrative officers to make such rules and regulations as may be deemed necessary to enforce the provisions of the law. The true distinction in all such cases is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the second, no valid objection can be made."

Judge Wellborn in U. S. vs. Maid, infra, expressed these sentiments:

> "A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra, and yet be ineffectual as the basis of a criminal prosecution. * * * The obvious ground of distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although

such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial function."

On this point see also quotation below from U. S. vs. Eaton.

The power of an administrative officer to make rules for the proper carrying out and enforcing a law is said to be absolutely necessary, and the cases are numerous in both state and Federal courts where the delegation of such power has been held not to be a violation of the principle that legislative power cannot be delegated. But the cases wherein the effect of the rule has been to make the violation of such rule a criminal offense are few. Among those upholding the exercise of the power as lawful are: United States vs. Breen 40 Fed. Rep. 402, and United States vs. Ormsbee, 74 Fed. Rep. 207, wherein statutes authorizing the Secretary of War to prescribe rules governing the use of navigable waters and making a violation of them a misdemeanor were sustained.

Among the cases denying the exercise of such power, are:

U. S. vs. Eaton, 144 *U. S.* 677, 36, *L. Ed.* 594.
U. S. vs. Keokuk & H. Bridge Co. 45 *Fed. Rep.* 178.
U. S. vs. Rider, 50 *Fed. Rep.* 106.
U. S. vs. Maid, 116 *Fed. Rep.* 650.
U. S. vs. Blasingame, 116 *Fed. Rep.* 654.
U. S. vs. Mathews, 146 *Fed. Rep.* 306.
Ex parte Cox, 63 *Cal.* 21.
Harbor Com'r. vs. Excelsior Redwood Co. 88 *Cal.* 491.
Schaezlein vs. Cabaniss, 135 *Cal.* 466.

The case of U. S. vs. Eaton is the only one where such a statute has come before the Supreme Court, and while the language of the act therein construed was not so broad as in this one relating to the forest reserve, yet, in the opinion rendered, this court seems to have clearly defined its position. In holding that a sufficient statutory authority should exist for declaring any act or omission a criminal offense the court laid down this doctrine:

> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violatoin of a public law, either forbidding or commanding it.' Am. & Eng. Enc. Law, 642; 4 Bl. Com. 5.
>
> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of a business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under Sec. 18 of the Act; particularly when the same Act, in Sec. 5, requires a manufacturer of the Article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require and does not impose, in the section or elsewhere in the Act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

> "It is necessary that a sufficient statutory authority should exist for declaring any Act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Sec. 41 of the Act of October 1, 1890.
>
> "Regulations prescribed by the president and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The Supreme Court of California has had occasion to pass on this question a number of times.

The case of Ex parte Cox, 63 Cal. 21, was a petition for writ of habeas corpus. The petitioner had been convicted of a misdemeanor, consisting of the violation of a rule and regulation of the Board of State Viticultural Commissioners, and sued out a writ of habeas corpus which was granted, and the petitioner discharged. The powers attempted to be exercised by the officers and commissioners were specified in the Act of March 4, 1871, passed by the legislature of California. In that case the court held:

"The act declares that the officer shall have power subject to the approval of the board, to declare and enforce rules and regulations in the nature of quarantine, to govern the manner of, and restrain or prohibit the importation into the State and the distribution and disposal within the State, of infected vines, cuttings, and empty fruit boxes, etc.; the act also declares that a wilful violation of the quarantine regulations of the board shall be a misdemeanor.

"For the purpose of local legislation, legislative functions may be conferred upon and exercised by municipal corporations; but the act before us is in no sense a conferring of powers for municipal purposes. The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor. The legislative power of the State is vested in the Senate and Assembly. (Const. Art. IV, Sec. 1.) That power could not, as to the case before us, be delegated to the officer or board. The act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the officer and board the power to so declare."

This case was followed in Harbor Com'rs vs. Excelsior Redwood Co., 88 Cal. 419, and Schaezlein vs. Cabaniss, 135 Cal. 466.

Perhaps no clearer or more forcible statement of the point can be found than in the closing paragraph of the opinion of Judge Whitson in U. S. vs. Mathews, supra:

"This case does not fall within the rule so well explained and amplified by the authorities that the executive branch of the government may make proper rules and regulations for carrying

into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulaitons for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and regulations may only be prescribed for carrying out what congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the government to define that which is purely legislative, and that is purely legislative which defines rights, permits things to be done or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constituted the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary and not by Congress. As we have seen this cannot be done.'

From these cases it must be admitted the rule is well established that an administrative officer cannot be clothed with the power of prescribing what shall constitute a crime.

The principle supporting all of these cases is that legislative power is vested in Congress alone, and that power cannot be delegated to any agency whatsoever. The rule would apply equally as well were the person to

whom delegated a member or part of the legislative branch. The function of making laws has been by the people entrusted to Congress as a body and that body cannot violate the trust by delegating such power to another. That principle alone is sufficient ground for holding the act here in question invalid for the purposes of this case. But there is another principle which may be invoked in support of the doctrine which has not been emphasized in any of these cases, and that is the danger which must necessarily follow if such practice be permitted. We refer to the danger of vesting in the same agent the power of making and also of executing the laws.

A reference to the words of some of the ablest statesmen who participated in the framing of our constitution and in starting the machinery of our government will show that it was with a view of avoiding such danger, that they, in their wisdom, contrived a separation of governmental functions into three grand departments and forbade each to entrench upon the powers of the others.

This analysis of Government into three parts is as old as Aristotle. In his Politics, he says that in every state there are three divisions; the general assembly deliberating upon public affairs, a body of magistrates, and a judiciary. But Montesquieu, the great French jurist, whose teachings were devoured by our forefathers in their struggle for liberty, "was the first to demonstrate that the separation of governmental powers is indispensable to civil liberty. He was the first to introduce the theory of the separation of governmental powers as a fundamental principle of our modern poli-

tical science." (Bondy in Separation of Governmental Powers, Columbia College Studies in Political Science. Vol. V No. 2, p. 12, 13.) "When the legislative and executive powers are united in the same person or body," says Montesquieu, "there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Blackstone says:

> "Whenever the right of making and enforcing the law is vested in the same man or one and the same body of men there can be no public liberty. The magistrate may enact tyrranical laws and execute them in a tyrranical manner, since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself." I. Com. 146.

These teachings were adopted by our forefathers with perfect unanimity. In his farewell address Washington says: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism." James Madison in Federalist No. XLVII says: "The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." In this maxim Thomas Jefferson thoroughly concurred. In his notes on Virginia, page 195, he says: "The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be

as oppressive as one." John Adams said: "It is by balancing each of these three powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved." While this court is not obliged to follow these sentiments in construing the constitution, yet the "statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the constitution itself." U. S. vs. Wong Kem Ark. 169 U. S. 699. In modern times Webster wrote: "The separation of the departments so far as practicable, and the preservation of clear lines between them, is the fundamental idea in the creation of all our constitutions, and doubtless the continuance of regulated liberty depends on maintaining these boundaries." Justice Miller in commenting on the Constitution in Kilbourn vs. Thompson, 103 U. S., 188, said:

> "It is believed to be one of the chief merits of the American system of written constitutional law that all powers entrusted to governments, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department,

and no others. To these general propositions there are in the Constitution of the United States some important exceptions. * * * * In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and the judicial department of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachment upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptation to those to whom that exercise is entrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not entrusted to either of them."

One cannot hear the voices of these great founders echoing down through the history of our republic without being impressed with the belief that they never intended that Congress, the creature of their work, should violate those principles by vesting in the same person the power of promulgating and also of executing a law.

If such is not the letter of our Constitution, it must be the spirit. Yet that is precisely what Congress has here attempted to do. Congress does not say that stock shall not trespass on the forest reserve. It does not say that "all persons must secure permits before grazing any stock." It does not say that to do or not to do any specific fixed thing shall constitute a crime. But it is the Secretary of Agriculture, the one whose duty it is to administer and execute the law, that does all these things. The rule which constitutes the alleged offense is the fiat of a subordinate administrative and appointive officer. His fiat may be one thing today, another tomorrow. Its stability depends upon the tenure of the office or the caprice of the man.

III.

The worst fallacy which counsel for the government commits is when he attempts to uphold the statute on the ground that the government, in dealing with forest reserves, is acting not only in its sovereign capacity, but as a landed proprietor. We are surprised indeed that resort should have been made to this line of argument for neither is the statement of the legal principle correct nor do the authorities cited support such principle. It is urged that the acts of the defendants which constitute the basis of the offense charged, independent of any such statute or rule, involve an interference with the property of the government, constitute a trespass, are a wrong, and no legislation was necessary to make the prohibited act a crime.

It is surprising that counsel for the government should have seriously argued for a moment that this

landed proprietor theory authorized the government to prosecute any act which has not been made a crime by statutory enactment, for it has been a well settled rule of law almost from the foundation of the government that there are no common law offenses against the United States.

U. S. vs. Britton, 108, *U. S.* 199, 27 *L. Ed.* 698.
U. S. vs. Hudson, 7 *Cranch* 32, 3 *L. Ed.* 259.

We do not deny that the government, as a landed proprietor, has the right to bring a *civil action* for trespasses on its domain, and also to abate nuisances, independent of any statuory provision. Such was the case of Camfield vs. United States, 167 U. S., 518, which was an action for the removal and abatement of a fence on the public domain, and we have searched the opinion of the court in that case in rendering its decision and the statutes referred to in vain to find any reference to any criminal liability.

The late Solicitor-General in the last paragraph of his brief uses the following language: "The act of Congress, in the view now presented, means the same as if it read: 'It shall be a crime to enter upon or use forest lands of the United States *after refusal of the consent* of the Secretary of Agriculture.' " This statement conclusively shows the error of the government's position in this case. Counsel desires this court to construe the act as meaning something which cannot, by any stretching of the rules of statutory interpretation, be construed to be within either the letter or spirit of the statute. Had Congress in passing the statute used the words which counsel for the government has suggested, then a very different state of affairs would

have been presented. In an indictment founded on such a law as that which the Solicitor-General suggests the present act means, it would have been necessary to allege and prove the affirmative refusal of the consent of the Secretary of Agriculture to enter upon and use forest lands, and no crime could have been predicated upon the accidental straying of a sheep herder with a band of sheep upon a forest reserve, an act that only violates a set of rules and regulations promulgated by the Secretary, carried around in the pockets of forest supervisors, which does not become a part of the statute in fact, is not recorded in the statutes of the United States, and no trace of which can be found in the records of either branch of Congress. Were the statute worded as it is proposed in the brief of the Solicitor-General to have it construed, it would then certainly define *one crime, and only one,* against the United States; it would not be open to the objections urged against it in this brief, and the penal code of the United States would not have annexed to it a chapter of criminal laws, the fiat of an administrative officer, never passed by, or brought to the attention of, the Congress of the United States.

No better illustration of this may be had than by a reference to the different rules promulgated by the Secretary under this act. On December 1, 1905, regulations were made, "and established to take effect January 1, 1906, and all previous regulations in conflict with the same are hereby repealed." On June 11, 1906, another set of regulations were made "and established to take effect July 1, 1906, and all previous regulations in conflict with them are hereby revoked." On June 1, 1908, another set of regulations were made and pro-

mulgated and "hereby approved, to take effect July 1, 1908, and all previous regulations in conflict with them are hereby revoked." Strange to say this very regulation 45 as promulgated on June 11, 1906, differs from regulation 9 as made on December 1, 1905, and is altogether different from the last regulation on this subject numbered 48 made on June 1, 1908.

A regulation subject to such changes is not, a "rule of action prescribed by a superior which an inferior is bound to obey" or "a rule of civil conduct prescribed by the supreme power in a state," which have been the conception of legal minds as proper definitions of law.

We submit that the Act of Congress approved June 4, 1897, does not in its terms sufficiently define the essential constituent elements of a crime against the United States; that it does delegate to the Secretary of Agriculture the legislative power to enact, repeal, and amend a criminal law of the United States; that such a delegation of power is subversive of the fundamental rights of citizens of the United States, deprives them of their liberty and property without due process of law, and strikes at the very foundations of a republican form of government. The demurrers to the indictments should be sustained, and the judgment of the District Court of California in all things affirmed.

Respectfully submitted,

W. W. KAYE,
ROBERT P. STEWART,
J. M. HODGSON,
Attorneys for Defendants in Error.

UNITED STATES *v.* GRIMAUD.

SAME *v.* INDA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Nos. 241, 242. Argued February 28, 1910; affirmed by divided court March 14, 1910; restored to docket for reargument April 18, 1910; reargued March 3, 1911.—Decided May 3, 1911.

Under the acts establishing forest reservations, their use for grazing or other lawful purposes is subject to rules and regulations established by the Secretary of Agriculture, and it being impracticable for Congress to provide general regulations, that body acted within its constitutional power in conferring power on the Secretary to establish such rules; the power so conferred being administrative and not legislative, is not an unconstitutional delegation.

While it is difficult to define the line which separates legislative power to make laws and administrative authority to make regulations, Congress may delegate power to fill up details where it has indicated its will in the statute, and it may make violations of such regulations punishable as indicated in the statute; and so *held*, that regulations made by the Secretary of Agriculture as to grazing sheep on forest reserves have the force of law and that violations thereof are punishable, under act of June 4, 1897, c. 2, 30 Stat. 35, as prescribed in § 5388, Rev. Stat.

Congress cannot delegate legislative power, *Field* v. *Clark*, 143 U. S. 692, but the authority to make administrative rules is not a delegation of legislative power, and such rules do not become legislation because violations thereof are punished as public offenses.

Even if there is no express act of Congress making it unlawful to graze sheep or cattle on a forest reserve, when Congress expressly provides that such reserves can only be used for lawful purposes subject to regulations and makes a violation of such regulations an offense, any existing implied license to graze is curtailed and qualified by Congress; and one violating the regulations when promulgated makes an unlawful use of the Government's property and becomes subject to the penalty imposed.

A provision in an act of Congress as to the use made of moneys received from government property clearly indicates an authority to the executive officer authorized by statute to make regulations regarding the property to impose a charge for its use.

Where the penalty for violations of regulations to be made by an executive officer is prescribed by statute, the violation is not made a crime by such officer but by Congress, and Congress and not such officer fixes the penalty, nor is the offense against such officer but against the United States.

170 Fed. Rep. 205, reversed.

By the act of March 3, 1891, c. 561 (26 Stat. 1103), the President was authorized, from time to time, to set apart and reserve, in any State or Territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations. And by the act of June 4, 1897, c. 2 (30 Stat. 35), the purposes of these reservations were declared to be "to improve and protect the forest within the reservation, and to secure favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." . . . "All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." (30 Stat. 36.)

It is also provided that nothing in the act should "be construed as prohibiting the egress and ingress of actual settlers residing within the boundaries of such reservations, . . . nor shall anything herein . . . prohibit any person from entering upon such forest reservation for all proper and lawful purposes, . . . provided that such persons comply with the rules and regulations covering such forest reservation."

There were special provisions as to the sale of timber from any reserve (except those in the State of California, 30 Stat. 35, c. 2; 31 Stat. 661, c. 804), and a requirement

that the proceeds thereof and from any other forest source should be covered into the Treasury, the act of February 1, 1905, 33 Stat. 628, c. 288, providing that "all money received from the sale of any products or the use of any land or resources of said forest reserve shall be covered into the Treasury of the United States for a period of five years from the passage of this act, and shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement and extension of Federal Forest Reserves."

The act of 1905 as to receipts arising from the sale of any products or the use of any land was, in some respects, modified by the act of March 4, 1907, c. 2907, 34 Stat. 1256, 1270. It provided that all moneys received after July 1, 1907, by or on account of forest service timber; or from any other source of forest reservation revenue, shall be covered into the Treasury, "provided that ten per cent of all money received from each forest reserve during any fiscal year, including the year ending June 30, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads in the county or counties in which the forest reserve is situated."

The jurisdiction, both civil and criminal, over persons within such reservation was not to be affected by the establishment thereof "except so far as the punishment of offenses against the United States therein is concerned; the intent being that the State shall not by reason of the establishment of the reserve lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duty as citizens of the State."

The original act provided that the management and regulation of these reserves should be by the Secretary

of the Interior, but in 1905 that power was conferred upon the Secretary of Agriculture, (33 Stat. L. 628), and by virtue of those various statutes he was authorized to "make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . ; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as prescribed in Rev. Stat., § 5388," which, as amended, provides for a fine of not more than five hundred dollars and imprisonment for not more than twelve months or both, at the discretion of the court. 26 Stat., 1103, c. 561; 30 Stat. 34; c. 235; 31 Stat. 661, c. 804; 33 Stat. 36; 7 Fed. Stat. Anno. §§ 310–317, 296, Supp. 1909, p. 634.

Under these acts the Secretary of Agriculture, on June 12, 1906, promulgated and established certain rules for the purpose of regulating the use and occupancy of the public forest reservations and preserving the forests thereon from destruction, and among those established was the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers and milch or work animals, not exceeding a total of six head, owned by *bona fide* settlers residing in or near a forest reserve, which are excepted and require no permit."

The defendants were charged with driving and grazing sheep on a reserve, without a permit. The grand jury in the District Court for the Southern District of California, at the November term, 1907, indicted Pierre Grimaud and J. P. Carajous, charging that on April 26, 1907, after the Sierra Forest Reserve had been estab-

lished, and after regulation 45 had been promulgated, "they did knowingly, wilfully and unlawfully pasture and graze and cause and procure to be pastured and grazed certain sheep (the exact number being to the grand jurors unknown) upon certain land within the limits of and a part of said Sierra Forest Reserve, without having theretofore or at any time secured or obtained a permit or any permission for said pasturing or grazing of said sheep or any part of them, as required by the said rules and regulations of the Secretary of Agriculture," the said sheep not being within any of the excepted classes. The indictment concluded, "contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States."

The defendants demurred, upon the ground (1) that the facts stated did not constitute a public offense, or a public offense against the United States, and (2) that the acts of Congress making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional, in that they are an attempt by Congress to delegate its legislative power to an administrative officer." The court sustained the demurrers, (170 Fed. Rep. 205), and made a like ruling on the similar indictment in *United States* v. *Inda*, 216 U. S. 614. Both judgments were affirmed by a divided court. Afterwards petitions for rehearing were granted.

Mr. Assistant Attorney General Fowler, with whom *Mr. Loring C. Christie* was on the brief, for the United States. *Mr. Solicitor General Bowers* on the original argument:

Congress has power to enact legislation for the protection of its public lands, and, if it deems advisable, to enact criminal laws to prevent trespasses thereon. *Camfield* v. *United States*, 167 U. S. 518, 525.

A violation of the regulations prescribed by the Secretary of Agriculture upon which, and the statute authorizing them, this indictment is based, constitutes an offense, and renders the offender liable to punishment in accordance with the terms of the statute. *United States* v. *Bailey*, 9 Pet. 238, 252, 254, 256.

A certain act upon the part of a person becomes a criminal offense in consequence and by virtue of a regulation adopted by the executive officer where such officer's action in adopting such regulation is essential to the existence of the offense. *Caha* v. *United States*, 152 U. S. 211, 218; *United States* v. *Eaton*, 144 U. S. 677, distinguished; and see *In re Kollock*, 165 U. S. 526; *United States* v. *Breen*, 40 Fed. Rep. 402; *St. Louis & Iron Mt. Ry. Co.* v. *Taylor*, 210 U. S. 281.

The act of Congress under which the Secretary of Agriculture promulgated the regulation in question did not involve an improper attempt to delegate legislative power to an administrative officer. *Brown* v. *Turner*, 70 N. Car. 93, 102; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 382; *Dastervignes Case*, 122 Fed. Rep. 30, 34; *West* v. *Hitchcock*, 205 U. S. 80; *Interstate Com. Comm.* v. *Chi., R. I. & P. R. R. Co.*, 218 U. S. 88; *Tilley* v. *Savannah &c. Ry. Co.*, 5 Fed. Rep. 641; *Chicago &c. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866; *Interstate Com. Comm.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452; Willoughby on the Constitution, § 781.

The act was unlawful irrespective entirely of regulation 45 or of any other rule of the Department. It was an entry and trespass on the lands of the United States. *Camfield* v. *United States, supra; Buford* v. *Houtz*, 133 U. S. 320, 326, distinguished, and see *Wilcox* v. *McConnel*, 13 Pet. 496, 512. The Secretary did not attempt to make unlawful that which, but for such rules, would have been lawful, as in *United States* v. *Moody*, 164 Fed. Rep. 269.

Congress has a much more exclusive control over pub-

lic forest lands and reservations, and a much wider range of means in exercising it, than it has in respect to its more general functions under the Constitution. See as to other similar powers, *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320; *Ex parte Reed*, 100 U. S. 13; *Smith* v. *Whitney*, 116 U. S. 167; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 309; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 125.

The general theory of government that there should be no union between the several departments does not apply any more than it did in *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Oceanic Nav. Co.* v. *Stranahan*, *supra*.

The fact that the Secretary has the power to change the regulations in question, and has from time to time had in force regulations different in some respects to the present one, does not render the act of Congress invalid.

The Government's contention is sustained by the weight of authority among the lower United States courts. As to the validity of the Secretary's regulation for civil purposes see, *United States* v. *Shannon*, 151 Fed. Rep. 863; *S. C.*, 160 Fed. Rep. 870; *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *United States* v. *Dastervignes*, 118 Fed. Rep. 199. The following have held indictment for violation of the regulation supportable: *United States* v. *Deguirro*, 152 Fed. Rep. 568; *United States* v. *Domingo*, 152 Fed. Rep. 566; *United States* v. *Bale*, 156 Fed. Rep. 687. On the other hand, the following held such an indictment bad: *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Bale*, 156 Fed. Rep. 687; *United States* v. *Rizzinelli*, 182 Fed. Rep. 675; *Dent* v. *United States*, 8 Arizona, 413; *United States* v. *Reder*, 69 Fed. Rep. 965; *United States* v. *Williams*, 6 Montana, 379; *United States* v. *Trading Company*, 109 Fed. Rep. 239; *United States* v. *Ormsbee*, 74 Fed. Rep. 207; *United States* v. *Moody*, 164 Fed. Rep. 269; *Van Lear* v. *Eisle*, 126 Fed.

Rep. 823; *United States* v. *Slater*, 123 Fed. Rep. 115; *Stratton* v. *Oceanic Steamship Co.*, 140 Fed. Rep. 829.

As to other instances in which Congress has conferred upon executive officers equally broad powers to be exercised in administering the laws relating to public lands, see act of June 3, 1878, c. 150, 20 Stat. 88; act of June 3, 1878, c. 151, 20 Stat. 89; act of March 3, 1891, c. 561, as amended by the act of March 3, 1891, c. 559, 26 Stat. 1093; act of October 1, 1890, c. 1263, 26 Stat. 650; act of February 28, 1899, c. 221, 30 Stat. 908; § 2478, Rev. Stat.

A criminal indictment lies for transgression of the department regulation concerning stock grazing upon a forest reservation, 22 Ops. Atty. Gen. 266.

Mr. J. M. Hodgson, with whom *Mr. W. W. Kaye* and *Mr. Robert P. Stewart* were on the brief, for defendants in error:

The law is unconstitutional, as it does not sufficiently define, or define at all, what acts done or omitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States. *State* v. *Mann*, 2 Oregon, 238, 241; *State* v. *Smith*, 30 La. Ann. 846; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Grimaud*, 170 Fed. Rep. 206; *Cook* v. *State* (Ind.), 59 N. E. Rep. 489; *United States* v. *Reese*, 92 U. S. 214, 256; *Sarlls* v. *United States*, 152 U. S. 571; *Todd* v. *United States*, 158 U. S. 278; *Augustine* v. *State* (Tex.), 52 S. W. Rep. 80; *State* v. *Partlow*, 91 N. Car. 550; *McGuire* v. *Dist. of Col.*, 65 L. R. A. 430; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Louisville & Nash. R. R. Co.* v. *Commonwealth* (Ky.), 33 L. R. A. 209; *Drake* v. *Drake*, 4 Dev. 110; *Commonwealth* v. *Bank*, 3 Watts & S. 173; 4 Blackstone's Comm. 5; 12 Cyc. 129; *Ex parte McNulty*, 77 California, 164; *Peters* v. *United States*, 36 C. C. A. 105.

The law under which the indictments were found is

unconstitutional, as it is not within the power of Congress to delegate to the Secretary of the Interior or the Secretary of Agriculture or any other person, authority or power to determine what acts shall be criminal; and the act in question is a delegation of legislative power to an executive officer to define and establish what shall constitute the essential elements of a crime against the United States. *United States* v. *Matthews*, 146 Rep. Fed. 306; *United States* v. *Maid*, 166 Fed. Rep. 650; *United States* v. *Blasingame*, 166 Fed. Rep. 654; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Bridge Co.*, 45 Fed. Rep. 178; *United States* v. *Rider*, 50 Fed. Rep. 106; *O'Neil* v. *Am. Fire Ins. Co.*, 166 Pa. St. 72; *Adams* v. *Burdge*, 95 Wisconsin, 390; *Dowling* v. *Lancashire Ins. Co.*, 92 Wisconsin, 63; *Anderson* v. *Manchester Fire Ins. Co.*, 59 Minnesota, 182; *Ex parte Cox*, 63 California, 21; *Harbor Com'r* v. *Excelsior Redwood Co.*, 88 California, 491; *Schaezlein* v. *Cabaniss*, 135 California, 466; *Kilbourn* v. *Thompson*, 103 U. S. 168, 191; *United States* v. *Wiltberger*, 5 Wheat. 85.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the Forest Reserve Act of 1891 was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations and made a violation thereof a penal offense. Their several demurrers were sustained. The Government brought the case here under that clause of the Criminal Appeals Act, (March 2, 1907, c. 2564, 34 Stat. 1246,), which allows a writ of error where the "decision complained of was based upon the invalidity of the statute."

The Federal courts have been divided on the question as to whether violations of those regulations of the Secretary of Agriculture constitute a crime. The rules were held to be valid for civil purposes in *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *United States* v. *Dastervignes*, 118 Fed. Rep. 199; *United States* v. *Shannon*, 151 Fed. Rep. 863; *S. C.*, 160 Fed. Rep. 870. They were also sustained in criminal prosecutions in *United States* v. *Deguirro*, 152 Fed. Rep. 568; *United States* v. *Domingo*, 152 Fed. Rep. 566; *United States* v. *Bale*, 156 Fed. Rep. 687; *United States* v. *Rizzinelli*, 182 Fed. Rep. 675. But the regulations were held to be invalid in *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Matthews*, 146 Fed. Rep. 306; *Dent* v. *United States*, 8 Arizona, 138.

From the various acts relating to the establishment and management of forest reservations it appears that they were intended "to improve and protect the forest and to secure favorable conditions of water flows." It was declared that the acts should not be "construed to prohibit the egress and ingress of actual settlers" residing therein nor "to prohibit any person from entering the reservation for all proper and lawful purposes, including that of prospecting, and locating and developing mineral resources; provided that such persons comply with the rules and regulations covering such forest reservation." (Act of 1897, c. 2, 30 Stat. 36.) It was also declared that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished*" as is provided in § 5388, c. 3, p. 1044 of the Revised Statutes, as amended.

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be

subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor.

By whatever name they are called they refer to matters of local management and local police. *Brodbine* v. *Revere*, 182 Massachusetts, 598. They are "not of legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature [authorities] the determination of minor matters." *Butte City Water Co.* v. *Baker*, 196 U. S. 126.

It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 1, 42, where he was considering the authority of courts to make rules. He there said: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." What were these non-legislative powers which Congress *could* exercise but which might also be delegated to others was not determined, for he said: "The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452;

Int. Com. Comm. v. *Chicago, Rock Island &c. R. R.*, 218 U. S. 88. Congress provided that after a given date only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. *St. Louis & Iron Mountain R. R.* v. *Taylor*, 210 U. S. 281, 287. In *Union Bridge Co.* v. *United States*, 204 U. S. 364; *In re Kollock*, 165 U. S. 526; *Buttfield* v. *Stranahan*, 192 U. S. 470, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

The defendants rely on *United States* v. *Eaton*, 144 U. S. 677, where the act authorized the Commissioner to make rules for carrying the statute into effect, but imposed no penalty for failing to observe his regulations. Another section (5) required that the dealer should keep books showing certain facts, and providing that he should conduct his business under such surveillance of officers as the Commissioner might by regulation require. Another section declared that if any dealer should knowingly omit to do any of the things "required by law" he should pay a penalty of a thousand dollars. Eaton failed to keep the

books required by the regulations. But there was no charge that he omitted "anything required by law," unless it could be held that the books called for by the regulations were "required by law." The court construed the act as a whole and proceeded on the theory that while a violation of the regulations might have been punished as an offense if Congress had so enacted, it had, in fact, made no such provision so far as concerned the particular charge then under consideration. Congress required the dealer to keep books rendering return of materials and products, but imposed no penalty for failing so to do. The Commissioner went much further and required the dealer to keep books showing oleomargarine received, from whom received and to whom the same was sold. It was sought to punish the defendant for failing to keep the books required by the regulations. Manifestly this was putting the regulations above the statute. The court showed that when Congress enacted that a certain sort of book should be kept, the Commissioner could not go further and require additional books; or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished. It said that, "if Congress intended to make it an offense for wholesale dealers to omit to keep books and render returns required by regulations of the Commissioner, it would have done so distinctly"—implying that if it had done so distinctly the violation of the regulations would have been an offense.

But the very thing which was omitted in the Oleomargarine Act has been distinctly done in the Forest Reserve Act, which, in terms, provides that "any violation of the provisions of this act or such rules and regulations of the Secretary shall be punished as prescribed in section 5388 of the Revised Statutes as amended."

In *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386, Mr. Justice Harlan, speaking for the court, said:

"By the statute in question Congress declared in effect

that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

And again he said in *Field* v. *Clark*, 143 U. S. 649, 694:

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." See also *Caha* v. *United States*, 152 U. S. 211; *United States* v. *Bailey*, 9 Pet. 238; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 309; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 333; *Roughton* v. *Knight*, 219 U. S. 537 (Decided this Term); *Smith* v. *Whitney*, 116 U. S. 167; *Ex parte Reed*, 100 U. S. 22; *Gratiot* v. *United States*, 4 How. 81.

In *Brodbine* v. *Revere*, 182 Massachusetts, 598, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act that breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while

the substantive legislation was in the statute which provided that they should be punished as breaches of the peace.

That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U. S. 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering such forest reservation." The same act makes it an offense to violate those regulations, that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in *Buford* v. *Houtz*, 133 U. S. 326, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. *Wilcox* v. *Jackson*, 13 Pet. 498, 513.

If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.

It was argued that, even if the Secretary could establish regulations under which a permit was required, there was

nothing in the act to indicate that Congress had intended or authorized him to charge for the privilege of grazing sheep on the reserve. These fees were fixed to prevent excessive grazing and thereby protect the young growth, and native grasses, from destruction, and to make a slight income with which to meet the expenses of management. In addition to the general power in the act of 1897, already quoted, the act of February 1, 1905, c. 288, p. 628, clearly indicates that the Secretary was authorized to make charges out of which a revenue from forest resources was expected to arise. For it declares that "all money received from the sale of any products or the use of any land or resources of said forest reserve" shall be covered into the Treasury and be applied toward the payment of forest expenses. This act was passed before the promulgation of regulation 45, set out in the indictment.

Subsequent acts also provide that money received from "any source of forest reservation revenue" should be covered into the Treasury, and a part thereof was to be turned over to the treasurers of the respective States to be expended for the benefit of the public schools and public roads in the counties in which the forest reserves are situated. (C. 2907, 34 Stat. 684, 1270.)

The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson* v. *United States*, 207 U. S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

The indictment charges, and the demurrer admits that Rule 45 was promulgated for the purpose of regulating the occupancy and use of the public forest reservation and preserving the forest. The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, "contrary to the laws of the United States and the peace and dignity thereof." The demurrers should have been overruled. The affirmances by a divided court heretofore entered are set aside and the judgments in both cases

Reversed.